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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 349

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SELLAR BULLARD, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF CLARA R. SMITH, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 25, 1937
CERTIORARI GRANTED OCTOBER 11, 1937

IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

No. 6120

SELLAR BULLARD, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF CLARA R. SMITH, DECEASED,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Counsel for Petitioner:
MR. SAMUEL S. HOLMES,
MR. LORENTZ B. KNOUFF,

Counsel for Respondent:
MR. ROBERT H. JACKSON,
MR. SEWALL KEY,

Petition for Review of Decision of the United States Board of Tax Appeals.

INDEX.

Docket Entries 1
Petition filed Nov. 5, 1934..... 3
Exhibit A—Deficiency letter of Oct. 22, 1934..... 5
Statement 6
Exhibit B—Indenture dated Feb. 17, 1932, between Clara R. Smith and Continental Illinois Bank & Trust Co. 8
Schedules A and B.....14-15
Answer, filed Nov. 23, 1934..... 16

Statement of Evidence.

Petitioner's Witnesses:
Bentley, Richard 28
Bullard, Sellar 17
Concannon, Matthias 26
Fairweather, H. J..... 30
Holmes, Samuel S..... 32
Peter, William F..... 31
Smith, Virginia Winslow..... 29
Certificate to statement of evidence..... 36

Petitioner's Exhibits.

No. 1—Agreement dated Mar. 3, 1927, between Clara R. Smith and Edward A. Smith..... 37
No. 1-A—Acceptance of appointment as successor Trustee 45

No. 2—Last Will and Testament of Clara R. Smith..... 46
No. 3—Bill to cancel voluntary settlement, filed in Superior Court 50
No. 4—Indenture dated Feb. 17, 1932, between Clara R. Smith and Continental Illinois Bank & Trust Co..... 64
Schedules A and B..... 70
No. 5—Last Will and Testament of Clara R. Smith dated Mar. 8, 1932..... 72
No. 6—Agreement dated Feb. 17, 1932, between Clara R. Smith and Virginia Winslow Smith..... 79
No. 7—Letter, Feb. 17, 1932, Clara R. Smith to Continental Illinois Bank & Trust Co..... 81
No. 8—Letter, Feb. 17, 1932, Clara R. Smith to Continental Illinois Bank & Trust Co..... 84
No. 9—Joint and Several Answer of Lora Smith Cowan, et al. filed in Superior Court..... 86
No. 10—Answer of Virginia Winslow Smith filed in Superior Court 87
No. 11—Letter, Jan. 15, 1932, to Mrs. A. P. Smith..... 89
No. 12—Letter, Jan. 20, 1932, to Mrs. Clara R. Smith... 91
No. 13—Letter, Feb. 1, 1932, Mrs. A. P. Smith..... 92
No. 14—Letter, Feb. 9, 1932, to Mrs. A. P. Smith..... 93
No. 15—Telegram, Feb. 15, 1932, to Sellar Bullard..... 94
No. 16—Letter, Feb. 16, 1932, to Mrs. A. P. Smith..... 94
No. 17—Telegram, Feb. 17, 1932, Sam Brown to Sellar Bullard 95
No. 18—Letter, Feb. 26, 1932, to Mrs. A. P. Smith..... 96
No. 19—Letter, 1-25-32, to Sellar Bullard..... 97
No. 20—Decree of Superior Court..... 98
No. 21—Certified copy of Last Will and Testament of Clara R. Smith, dated Sept. 10, 1932..... 108
Letters testamentary 115
No. 23—Bill to revoke and cancel voluntary settlement in trust and for accounting, etc., filed in State Court..... 116

Opinion filed Apr. 3, 1936 134
Decision, entered May 21, 1936 148
Petition for review, filed Aug. 11, 1936 148
Orders enlarging time for preparation of evidence and delivery of record to U. S. Circuit Court of Appeals 159-160
Praecipe for Record 160
Certificate of Clerk 161
Stipulation re printing record 162

Proceedings in U. S. C. C. A., Seventh Circuit 163
Clerk's certificate 163
Caption 163
Stipulation as to printing record 164
Minute entry of hearing 164
Opinion, Lindley, J. 165
Judgment 172
Clerk's certificate 173
Order allowing certiorari 174

32238—37

1 Sellar Bullard as Executor Under the Last Will and Testament of Clara R. Smith, Deceased,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 77764.

Appearances:

For Taxpayer: Samuel S. Holmes, Esq., Samuel H. Horne, Esq., Harry Thom, Esq., L. B. Knouff, Esq.

For Comm'r.: Walter W. Kerr, Esq.

DOCKET ENTRIES.

Transferred to Mr. Van Fossan 10/30/35.

1934

Nov. 5—Petition received and filed. Taxpayer notified. (Fee paid)

Nov. 5—Copy of petition served on General Counsel.

Nov. 22—Motion for circuit hearing in Chicago filed by taxpayer.

Nov. 22—Notice of the appearance of Samuel H. Horne as counsel for taxpayer filed.

Nov. 23—Answer filed by General Counsel.

Dec. 4—Copy of answer served on taxpayer.

Dec. 6—Revised notice. Copy of answer served on taxpayer.

Dec. 27—Hearing set week of Feb. 4, 1935 at Chicago, Illinois.

1935

Feb. 13—Hearing had before Mr. C. M. Trammell, Div. 2. Submitted on merits. Petitioner's brief due 4/1/35—respondent's 4/22/35—petitioner's reply 5/5/35.

Feb. 27—Transcript of hearing of 2/13/35 filed.

Mar. 5—Stipulation to correct transcript filed.

Mar. 30—Brief filed by taxpayer.

Mar. 30—Proposed findings of fact filed by taxpayer.

Apr. 1—Copy of brief and proposed findings of fact served.

Apr. 22—Brief filed by General Counsel.

May 4—Reply brief filed by taxpayer. 5/6/35 copy served.

Nov. 22—Motion for leave to file supplemental brief, supplemental brief lodged, filed by taxpayer.

Nov. 23—Motion for leave to file supplemental brief granted. Twenty days for respondent to reply.

Nov. 26—Copy of motion and supplemental brief served.

Dec. 12—Reply brief filed by General Counsel.

1936

Apr. 3—Opinion rendered, E. H. Van Fossan, Div. 9. Decision will be entered under Rule 50.

May 4—Motion for decision under Rule 50 filed by General Counsel.

May 6—Hearing set May 20, 1936.

May 20—Hearing had before Mr. Leech, Div. 6 on settlement under Rule 50. Not contested—referred to Mr. Van Fossan for decision.

May 21—Decision entered, Ernest H. Van Fossan, Div. 9.

Aug. 5—Motion to fix bond in amount of $22,200.00 filed.

Aug. 6—Order approving amount of bond as $22,200.00 entered.

Aug. 11—Power of attorney and agreement filed.

Aug. 11—Supersedeas bond in the amount of $22,200.00 approved and ordered filed.

2 Aug. 11—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by taxpayer.

Aug. 11—Proof of service filed.

Oct. 2—Motion for extension to 12/15/36 to prepare and transmit record filed by taxpayer.

Oct. 2—Order enlarging time for preparation of evidence and delivery of record to Dec. 15, 1936 entered.

Nov. 10—Agreed statement of evidence lodged.

Nov. 11—Agreed statement of evidence approved and ordered filed.

Nov. 30—Praecipe with proof of service thereon filed by taxpayer.

Dec. 12—Order enlarging time for transmission and delivery of the record to December 22, 1936 entered.

3 UNITED STATES BOARD OF TAX APPEALS. Filed Nov. 5, 1934.

Sellar Bullard, as Executor under the Last Will and Testament of Clara R. Smith, Deceased,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 77764.

PETITION.

Filed Nov. 5, 1934.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols—MT-ET-C1-10475—1st Illinois), dated October 22, 1934, and as a basis for his proceeding, alleges as follows:

1. The petitioner is the duly qualified and acting Executor under the Last Will and Testament of Clara R. Smith, deceased, with residence at 215 Orchard Lane, Highland Park, Illinois.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on October 22, 1934.

3. The taxes in controversy are an additional assessment of estate taxes against the above named estate, in the sum of $17,271.46.

4. The determination of the tax set forth in the said notice of deficiency is based upon the following errors:

4 The inclusion in the gross estate of the principal or corpus of a trust formed February 17, 1932, consisting of the following securities, of the aggregate value of $112,148.75:

594 shares American Can preferred
92 shares Addressograph-Multigraph common
162 shares Firestone Tire & Rubber common
33 shares Great Northern preferred
180 shares National Biscuit preferred
227 shares Union Pacific common

A copy of the trust indenture, dated February 17, 1932, is hereto attached and marked Exhibit B.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

That the property forming the principal or corpus of the trust dated February 17, 1932, described in Schedule E of Form 706, Federal Estate Tax Return of said executor, was not the property of the deceased at the time of the formation of said trust, but was on said date the property of others than the deceased, in and to which the deceased had no right, title, or interest, and that the deceased acted not for herself, but solely and only on behalf of and representing the real owners of said property in the formation of said trust, and therefore said trust funds are not taxable as a part of the estate of said deceased; that the transfer of the property forming the principal or corpus of the trust dated February 17, 1932, described in said Schedule E of Form 706, Federal Estate Tax return of said executor, under the said trust, was a bona fide sale for an adequate and full consideration in money or money's worth; and that therefore the property forming the corpus of said trust is not taxable.

Wherefore, the petitioner prays that this Board may hear the proceeding and determine that there is no deficiency due from the petitioner covering the Federal Estate Tax due
5 from said Estate of Clara R. Smith, deceased.

Samuel S. Holmes,
Counsel for Petitioner.

Samuel S. Holmes,
69 West Washington Street,
Chicago, Illinois.

Of Counsel:
McNab, Holmes & Long,
69 West Washington Street,
Chicago, Illinois.

State of Illinois, }
County of Cook. } ss.

Sellar Bullard, being first duly sworn, deposes and says that he is Executor under the Last Will and Testament of Clara R. Smith, deceased, and the petitioner above named; that he has read the foregoing petition by him subscribed and is familiar with the statements contained therein, and that the facts therein stated are true.

Sellar Bullard.

Subscribed and Sworn to before me this 31st day of October, 1934.

Mary E. Riley,
Notary Public.

(Seal)

6 EXHIBIT A.

MT-ET-C1-10475—1st Illinois
Estate of Clara R. Smith
Date of Death—May 24, 1933

Oct. 22, 1934

Sellar Bullard, Executor,
215 Orchard Lane,
Highland Park, Illinois

Sir:

A deficiency of $17,271.46 in the Federal estate tax liability of the above-named estate has been determined after a review of the file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency and the action of this office on the protest are fully explained in the attached statement.

This notice of deficiency is given in accordance with the provisions of Section 308 (a) of the Revenue Act of 1926 as amended by Section 501 of the Revenue Act of 1934, and a petition for a redetermination of the deficiency may be filed with the United States Board of Tax Appeals within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute and forward the enclosed Form 890, waiving the restrictions on the immediate assessment and collection of the deficiency.

The submission of the waiver will expedite the closing of this case and will also benefit the estate by preventing the accumulation of interest charges, as the interest period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the

enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver, Form 890, has not been submitted, the deficiency will be thereafter assessed.

Respectfully,
Guy T. Helvering,
Commissioner,
By D. S. Bliss,
Deputy Commissioner.

Enclosures:
Statement,
Waiver, Form 890

7 Your protest dated September 13, 1934, in answer to Bureau tentative letter of August 18, 1934, relates to the following:

Gross Estate.

Stocks and Bonds	Returned	Tentatively Determined	Determined
Item 10	$907.50	$990.00	$907.50

A review of the values of this item warrants the acceptance of the returned value.

Transfers.

The value of the following described property transferred by the decedent under a trust agreement dated February 17, 1932, is included in the gross estate pursuant to the provisions of Section 302 (c) of the Revenue Act of 1926, as amended, and Section 302 (d) of the Revenue Act of 1926:

Item 1	$0.00	$75,363.75	$75,363.75
Item 2	0.00	805.00	805.00
Item 3	0.00	3,280.50	3,280.50
Item 4	0.00	726.00	726.00
Item 5	0.00	6,277.50	6,277.50
Item 6	0.00	3,362.50	3,362.50
Item 6—Dividend	0.00	87.50	87.50
Item 7	0.00	22,246.00	22,246.00

The evidence submitted in your protest does not warrant a different conclusion than as shown in the tentative audit.

Accordingly, the foregoing adjustment is reflected in the following summary:

Gross estate	$653,231.63	$768,936.88	$768,854.38
Deductions (1926 Act)	143,605.93	143,366.57	143,366.57
Net estate (1926 Act)	$509,625.70	$625,570.31	$625,487.81
Gross estate	$653,231.63	$768,936.88	$768,854.38
Deductions (1932 Act)	93,605.93	93,366.57	93,366.57
Net estate (1932 Act)	$559,625.70	$675,570.31	$675,487.81

8	Returned	Tentatively Determined	Determined
Gross tax (1926 Act)	$ 17,981.29	$ 24,034.22	$ 24,029.27
Credit for State estate, inheritance, legacy, or succession taxes	13,992.79	13,293.16	13,293.16
Net tax (1926 Act)	$ 3,988.50	$ 10,741.06	$ 10,736.11
Total gross taxes (1926 and 1932 Acts)	$ 56,751.34	$ 73,335.55	$ 73,323.17
Gross tax (1926 Act)	17,981.29	24,034.22	24,029.27
Gross additional tax	$ 38,770.05	$ 49,301.33	$ 49,293.90
Net additional tax	$ 38,770.05	$ 49,301.33	$ 49,293.90
Net tax (1926 Act)	3,988.50	10,741.06	10,736.11
Total net tax	$ 42,758.55	$ 60,042.39	$ 60,030.01
Deficiency			$17,271.46

Upon receipt of a waiver or upon the expiration of ninety days from the date of this letter if a petition is not filed with the Board of Tax Appeals, $11,341.20 of the deficiency will be assessed. As the balance of the deficiency may be eliminated by credit for State or Territorial estate, inheritance, legacy, or succession taxes, opportunity will be accorded for the submission of the evidence required by Article 9 of Estate Tax Regulations 70 (1929 Edition). If, after a reasonable time the evidence is not filed, the balance of the deficiency will be assessed. Please advise when the submission of this evidence may be expected.

The deficiency bears interest at the rate of six per cent per

annum from one year after decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

9 EXHIBIT "B".

An Indenture, Made this 17th day of February, A. D. 1932, by and between Clara R. Smith of Highland Park, Lake County, Illinois, party of the first part (hereinafter for convenience referred to as the "Trustor"), and Continental Illinois Bank and Trust Company, an Illinois corporation, authorized to execute trusts, having its office in Chicago, Cook County, Illinois, party of the second part (hereinafter for convenience referred to as the "Trustee");

Whereas, the Trustor desires to create a trust of the property described and set forth in the schedule hereto attached, marked "Schedule A", to be held upon the terms and conditions and upon the trusts hereinafter set forth and declared, and desires the Trustee to act as trustee hereunder, and the Trustee is willing to receive and hold such property upon such trusts:

Now, Therefore, This Indenture Witnesseth:

That the Trustor, in consideration of the sum of One Dollar ($1.00) to her in hand paid by the Trustee, the receipt of which is hereby acknowledged, has sold, assigned, transferred, conveyed, and delivered, and by these presents does sell, assign, transfer, convey, and deliver the securities and property described in Schedule A hereto attached and made a part hereof as though set forth at length herein, to the Trustee, to be taken and held upon the following conditions and trusts:

First: (a) During the lifetime of the Trustor, but only after the death of Virginia Winslow Smith, the Trustor may,
10 at any time and from time to time by a further or supplemental instrument by her signed and acknowledged and delivered to the Trustee, (1) alter, change, or amend this agreement and the terms of the trust hereby created; (2) change the beneficiaries under this trust; (3) withdraw and receive all or any portion of the corpus of the trust estate; (4) wholly or partially revoke and annul the provisions hereof, Provided that the duties and responsibilities or the compensation of the Trustee shall not be changed or fixed without the consent of the Trustee; and (5) remove the Trustee and appoint a successor.

Second: The Trustee shall have the following rights and powers with respect to the trust estate:

(a) To invest and reinvest the trust estate; to collect the income, rents, issues, profits, and increase therefrom, and to sell upon any terms, give options to purchase, assign, lease, contract to lease, exchange, encumber, and pledge and mortgage, and to alter and change the investments thereof from time to time in its discretion; to improve, manage, protect, subdivide, and partition any real estate forming a part of the trust estate; to dedicate to public use and vacate any part thereof; to contract to sell, grant options to purchase, sell upon any terms, and convey, mortgage, or encumber; grant options to lease, and to lease for any term (including leases for ninety-nine years or a longer or shorter period of time) although such term extends beyond the period of the trust hereby created, and make leases upon such terms and conditions as may be deemed proper; to renew, exchange, and/or extend leases and consent to the assignment and modification of any lease;

(b) To retain as investments of the trust estate, without liability or responsibility for loss or depreciation in value, by reason of the fact that said securities and/or property may not be of the character permitted for investments by trustees under the laws of the State of Illinois, any securities and/or property that may be conveyed or transferred to it to be held under the trust hereby created.

(c) To invest and reinvest the trust estate in bonds of the United States of America, or of any state, municipality, or subdivision thereof, or in like securities of any country other than the United States of America; or in first mortgages and first mortgage bonds on or secured by income-producing real estate located in any state; or in bonds, notes, debentures, mortgages, or stocks of any corporation within or without the United States of America (the term "stock" to include voting trust certificates and shares of all classes of stock of any corporation if there be more than one); or in certificates of beneficial interest or participation in or promises to pay issued against or secured in whole or in part by groups of securities similar to or embracing those hereinabove specified; or in real or other property; although any of the investments herein set forth are not of the character permitted for investments by trustees under the laws of the State of Illinois now in force or at any time during the continuance of the trust in force;

(d) In its discretion, to unite with other owners of property or securities similar to any which may be held at any time in this trust in carrying out any plan for the reorganization of any corporation or company whose securities may form a portion of the trust estate at any time; to exchange securities of any corporation or company for others is-
12 sued by the same or any other corporation or company upon such terms as the Trustee shall deem proper; to consent to the consolidation or merger of any corporation or company with any other corporation or company, to the lease or sale by any corporation or company of its property or any portion thereof to any other corporation or company, or to the lease or sale by any other corporation or company of its property or a portion thereof to such corporation, and upon any consolidation, merger, lease, sale, or similar arrangement, to exchange the securities held for other securities issued in connection with such arrangement; and to pay all assessments, expenses, and sums of money which it may deem expedient or which may be required for the protection of the interests of the trust estate;

(e) All interest accrued on bonds or like securities at the time of transfer or delivery to the Trustee and all cash dividends declared prior to and payable after the delivery of any stocks to the Trustee shall be considered as income and not as principal.

Excepting as hereinbefore provided, the Trustee shall have power in its uncontrolled discretion to determine whether any part of the trust estate or any addition or increment thereto be income or principal, or whether any cost, charge, expense, tax, or assessment shall be charged against income or principal, or partly against income and partly against principal.

Any and all determiations and decisions by the Trustee under this paragraph shall be conclusive for all purposes and upon all persons.

(f) The trust estate shall be liable for inheritance and estate taxes, if any, levied upon or in respect of the trust estate for the distributive shares thereof, and the Trus-
13 tee is hereby authorized to reimburse the executor or other representative of the Trustor's estate for any such taxes paid by such executor or other representative in respect of the trust estate hereunder.

(g) In general, the Trustee is given as full and complete power and authority over the trust estate and property and

each and every part thereof as fully and to the same extent as any individual might, could, or would have owning similar properties and securities in his own right.

(h) No person dealing with the Trustee or the trust estate shall be bound to see to the application of any purchase money or other consideration, or any money borrowed under mortgage or pledge, or to inquire into the power and/or the authority of the Trustee or into the validity, expediency, or propriety of any sale, option, assignment, transfer, exchange, conveyance, mortgage, or pledge of the trust estate.

(i) The Trustee shall have full power and authority by contract to bind the trust estate without making itself individually liable, and to perform any and all other acts which it may deem proper for carrying out the purposes of this agreement.

(j) The Trustee may employ such agents, brokers, attorneys, and assistants as it may deem necessary or proper in the matter of the execution of the trusts herein. It shall in no event be liable for any neglect, omission, misconduct, mistake, act, or default of any agents, broker, attorney, or assistant selected or retained with reasonable care.

(k) The Trustee shall be paid a reasonable compensation for its services.

(l) All costs, charges, and expenses of the trust estate and of the management thereof, including compensation
14 of the Trustee and that of agents, brokers, attorneys, and assistants that it may employ, and all taxes, assessments, and charges thereon, shall be repaid and allowed to the Trustee from the trust fund, but shall be payable out of the income and not from the principal.

(m) The Trustee, in its discretion, may cause any securities or property at any time held by it hereunder to be carried in its individual name or in the name of a nominee without disclosing the fact that such property is part of the trust estate and without liability for conversion of any property so carried without disclosing the fact of the trust.

(n) In making distribution of the principal or corpus of the trust estate or of any part thereof, the Trustee, in its uncontrolled discretion, may make distribution to all or any of the beneficiaries hereunder in money and/or property of the trust estate. In making distribution in property, the Trustee shall not be required to distribute to any beneficiary an aliquot part of any security or property comprising the trust estate at the time of distribution, and the judgment of the

Trustee as to what shall constitute a proper division among them and its selection and valuation shall be binding and conclusive upon all beneficiaries hereunder.

(o) In making any distribution and in taking any action whatsoever hereunder, the Trustee may rely and shall be fully protected in relying upon any notice, certificate, affidavit or other paper or document believed by it to be genuine, or upon any evidence deemed by it to be sufficient. The Trustee shall be protected and saved harmless in all payments required to be made hereunder, made in good faith and without actual notice or knowledge of the changed condition or status of any person receiving payments upon a condition.

15 (p) The decision of the Trustee as to any discretions conferred upon it under the terms of this agreement shall be final and conclusive upon all concerned.

Third: No money or property (either principal or income) payable or distributable under the provisions of this instrument shall be pledged, assigned, transferred, sold, or in any manner whatsoever anticipated, charged, or encumbered by any of the beneficiaries hereunder, or be in any manner liable in the possession of the Trustee for the debts, contracts, obligations, or engagements of such beneficiaries, voluntary or involuntary, or for any claims, legal or equitable, against any beneficiary, including claims for alimony or for the support of any spouse. All payments to any beneficiary, whether by check or otherwise, shall be made only to and upon the personal receipt of such beneficiary.

Fourth: In the event that the Continental Illinois Bank and Trust Company at any time shall merge or consolidate with or shall sell or transfer substantially all its assets and business to another corporation, the corporation resulting from such merger or consolidation of the corporation to which such sale or transfer shall be made (whether organized under the laws of the State of Illinois or of the United States of America) shall thereupon become and be the Trustee hereunder without the execution of any instrument and without further action on the part of any person in interest under the terms of this agreement, and shall have all the powers and be subject to all the duties herein imposed upon or assumed by Continental Illinois Bank and Trust Company as Trustee under the terms of this agreement.

16 Fifth: The powers and duties of the Trustee hereunder and all questions of interpretation of this instrument shall be governed by the law of the State of Illinois.

Sixth: The income from the trust estate and the principal thereof shall be distributed as provided in Schedule B hereto attached, signed for further identification by the Trustor and by an officer of the Trustee, and made a part hereof as though at length fully set forth herein.

In Witness Whereof, The Trustor has hereunto signed her name and affixed her seal, and the Trustee has caused its name to be hereunto signed by its proper officers and its corporate seal to be affixed hereunto, all on the day and year first above written.

.....(Seal)

Continental Illinois Bank and Trust Company,

By .....

Vice-President.

Attest:

.....

Assistant Secretary.

17 State of California } ss.
County of Santa Barbara }

I, ..., a Notary Public in and for said County, in the State aforesaid, Do Hereby Certify that Clara R. Smith, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed, and delivered the said instrument as her free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and Notarial Seal this 17 day of February, 1932.

.....

Notary Public.

State of Illinois } ss.
County of Cook }

I, ..., a Notary Public in and for said County, in the State aforesaid, Do Hereby Certify that ..... and ..... personally known to me to be a Vice-President and an Assistant Secretary, respectively, of Continental Illinois Bank

and Trust Company, and known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act, and as the free and voluntary act and deed of said Bank, for the uses and purposes therein set forth; and the said _____, Assistant Secretary of said Bank, did then and there acknowledge and declare that he had affixed thereto the corporate seal of said Bank, pursuant to the authority granted to him by the By-Laws of said Bank.

Given under my hand and Notarial Seal this _____ day of _____, 1932.

_____

Notary Public.

18 SCHEDULE "A".

Being a List of Securities Deposited in Accordance with Trust Agreement
between
Clara R. Smith, as Trustor
and
Continental Illinois Bank and Trust Company, as Trustee
Dated February 17, 1932

594 shares	American Can Co. Pfd.
92 shares	Addressograph Multigraph Com.
162 shares	Firestone Tire & Rubber Com.
33 shares	Great Northern Pfd.
180 shares	International Harvester Com.
25 shares	National Biscuit Pfd.
227 shares	Union Pacific Com.

19 SCHEDULE "B".

Being the Schedule Referred to in Article Sixth of a Trust Agreement
between
Clara R. Smith, as Trustor
and
Continental Illinois Bank and Trust Company, as Trustee
Dated February 17, 1932
Providing for the Distribution of Principal and Income of the Trust Estate

---

The said Trustee shall pay all the net income arising from said trust estate to the Trustor, Clara R. Smith, for and during her natural life. Upon the death of said Trustor, Clara R. Smith, said Trustee shall pay the entire net income thereafter arising from said trust estate to Virginia Winslow Smith (daughter-in-law of said Trustor) for and during her natural life. Upon the death of both said Clara R. Smith and Virginia Winslow Smith said Trustee shall pay over and distribute all the principal of said trust estate, together with any accumulated and undistributed income thereon, to Lora Smith Cowan and Bessie Smith Bullard (daughters of said Trustor) in equal parts, share and share alike. The income provided hereunder to be paid to the above named beneficiaries shall be paid in monthly installments.

_____(Seal)
Continental Illinois Bank and Trust Company,
By _____
Assistant Secretary.

Filed Nov. 28, 1934.

UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—77764) * *

ANSWER.

Filed Nov. 23, 1934.

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Denies the allegations contained in paragraph 3 of the petition.

4. Denies that the determination of the deficiency is based upon errors as alleged in paragraph 4 of the petition.

5. Denies the allegations contained in paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the appeal be denied.

(Signed) Robert H. Jackson,
Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel:
Lewis S. Pendleton;
Special Attorney, Bureau of Internal Revenue.

51 UNITED STATES BOARD OF TAX APPEALS.
• • (Caption—77764) • •

Statement of evidence fil Nov. 11, 19

STATEMENT OF EVIDENCE.

Lodged Nov. 10, 1936.

Filed Nov. 11, 1936.

Following is a statement of the evidence submitted to the Board of Tax Appeals in the above mentioned case, so far as is necessary to the assignment of errors as filed, reduced to narrative form:

The following witnesses were called for and on behalf of the Petitioner:

SELLAR BULLARD:

Mr. Sellar Bullard testified that he resided at 215 Orchard Lane, Highland Park, Illinois; that he is the son-in-law of the decedent, Clara R. Smith, being married to her daughter, Bessie Smith Bullard. Prior to his retirement on December 31, 1933, he was, for approximately twenty years, in the investment business with Hitchcock & Company, 39 South La-
Salle Street, Chicago, Illinois. As the result of his mar-
52 riage to the said Bessie Smith Bullard, three children were born to them: Caroline Marie, Barbara Sellar, and Clara Jean, in 1935 of the approximate respective ages of twenty-three, twenty-two, and seventeen years.

The decedent, Clara R. Smith, had been a widow for forty years prior to 1932. In 1931 and 1932 Clara R. Smith had living two children: Lora Smith Cowan and Bessie Smith Bullard. Two children of decedent had died prior to 1932,—one an infant, and the other her son, Edward A. Smith, who died on December 16, 1928, at the age of fifty-one years.

Edward A. Smith left no children surviving him, but left a widow, Virginia Winslow Smith, who lived in Highland Park in a home adjoining decedent's residence.

The daughter, Lora Smith Cowan, was divorced about 1915, and had two children living in 1931,—Kennett Cowan, Jr., and Lora Cowan Ruehrdantz, then of the approximate ages of twenty-seven and twenty-four and one-half years.

For approximately a year and a half after the death of Edward A. Smith, Mr. Bullard aided his widow, Virginia Winslow Smith, in her business affairs. At the time of her husband's death Virginia Winslow Smith owned property of the approximate value of $250,000., and her home in Highland Park.

The decedent had two sisters who were married to officials of the American Can Company. One of these sisters gave to decedent a large number of shares of the preferred
53 and common stock of the American Can Company.

Thereafter and about 1916, the decedent made gifts of approximately 1,000 shares of American Can preferred stock to each of her three children, in the form of direct gifts to the son, Edward A. Smith, and the daughter, Bessie Smith Bullard, and of an irrevocable trust for the benefit of the daughter, Lora Smith Cowan. After Lora Smith Cowan's divorce from her husband the proceeds of this trust were the principal support of herself and her children.

For about thirty years prior to his death the son, Edward A. Smith, had handled the affairs of decedent and advised her in reference thereto. Subsequent to the death of Edward A. Smith Mr. Bullard became the sole business adviser of decedent, and acted as agent in the handling of her affairs, having the right to sign her checks, enter her safety deposit box, make out her income tax returns, collect coupons on her securities, and deposit dividend checks thereon. He had the custody of all her important papers, including her will.

In June, 1931, Mr. Bullard and his wife, decedent's daughter, were with decedent in California, and decedent then began to express considerable concern as to the general situation of her estate with reference to her then existing will and a trust created by her on March 3, 1927. Various family conferences were held after decedent returned to her home in Illinois in September, 1931, in regard to the matter.

54 The trust instrument of March 3, 1927 was introduced in evidence without objection as PETITIONER'S EXHIBIT 1, and identified by the witness.

At the time of the creation of this trust decedent had instructed her son, Edward A. Smith, who had had the trust instrument drawn, and who was trustee of said trust, to name Mr. Bullard as successor trustee, but instead he had made the Illinois Merchants Trust Company successor trustee, so that upon the death of Edward, the trust company became trustee.

This trust contained 1,824 shares of American Can pre-

ferred stock. The corporate trustee criticised this large holding of American Can preferred stock in the trust, and insisted that this stock or a large part of it should be sold and the proceeds reinvested, in order to secure greater diversification of investments within the trust estate. Mr. Bullard had several conferences with the trustee with respect to the sale of the American Can preferred stock, and the trustee made specific recommendations as to sale, and wrote a letter to that effect to decedent. This proposal of the trustee greatly disturbed decedent. She felt, from a family standpoint, that she would rather trust to the safety of the American Can Company preferred stock and receive the higher income therefrom than trust the ability of the trustee to reinvest. This attitude was shared by her two daughters, the remaindermen under the trust. In a joint letter to the trustee they tried
55 to impress upon it the fact that they as remaindermen felt the same as decedent in desiring retention of the American Can Company preferred stock. Decedent also wrote a letter to the Trustee stating that she wished the stock of the American Can Company to be retained, that she would take all responsibility for its retention, that she would relieve the Trustee from any responsibility in retaining said stock, and that she would hold the Trustee liable if it did not retain it. Mr. Bullard advised decedent, however, that the corporate trustee had sole power of sale and that under the provisions of the trust instrument the Trustee could sell any of the trust securities and reinvest the proceeds in any legal trust investments. Since the Trustee had complete power to sell and reinvest, and since it continued to express its determination to reduce the amount of American Can Company stock held in trust, decedent and her daughters, who were beneficiaries in remainder under the trust, were at all times uncertain as in what action the Trustee might take. That was the general feeling all the way through on this trust: A desire and insistence to a large extent on the part of the bank, to which the securities from what she had established the trust upon, into something that they felt was a more diversified list, but which she did not wish to accept, because she wished to retain the higher income which was available under the securities as deposited.

56 The two children also felt that a corporate trustee under the trust was not desirable.

The will of decedent which she had at the time of the death of her son, Edward, named him as executor. Upon his death

that provision of the will had to be changed, and a new will had been executed by decedent in August, 1929, identical in provisions with the previous one, except that it named the Chicago Title and Trust Company and Mr. Bullard as executors and trustees thereunder. A copy of this will was introduced in evidence without objection as PETITIONER'S EXHIBIT 2, and was identified by the witness.

In that will there were a number of specific bequests in money. In 1931, due to the fall in value of some of decedent's securities, and the uncertainty of the liquidating value of many of her other securities, Mr. Bullard suggested to decedent that she should reconsider her will, substituting gifts of definite securities rather than of money value, and also that she should consider generally her affairs.

Another reason for decedent's dissatisfaction with the set-up of her estate in 1931 was that she desired to make certain outright gifts to two of her grandchildren,—Kennett Cowan, Jr., who recently had been married, and Lora Louise Cowan, who was about to be married. She had thought that she would be able to make these gifts out of the property constituting the corpus of the trust of March 3, 1927. She
57 was advised by Sellar Bullard and by her attorney, Mr. Samuel S. Holmes, that this trust was irrevocable.

Decedent stated to Mr. Bullard that she had been led to believe by her son, Edward A. Smith, that the trust of March 3, 1927, was revocable, and that he had advised her that she could take back the funds constituting the trust at any time.

Mr. Bullard also testified that the attorney who drew the trust for Edward A. Smith had told him that it was irrevocable, and that it was a foolish trust to draw.

Various family conferences were held in regard to these matters, and decedent expressed to Mr. Bullard and to her children her desire to recall into her control a part of the corpus of the trust of March 3, 1927, viz: the major part of the shares of American Can Company preferred stock which she had transferred into the trust. Decedent conferred with her attorney in regard to the carrying out of her desire to have the trust altered, and she was advised that a friendly revocation and termination could be obtained if all the adult parties in interest would agree, and that, since there were minors who would be parties in interest at the time, it would be necessary to bring a court action to dissolve the trust and to protect the interests of the minors by gifts to them from

decedent in lieu of what they would have taken under the trust.

58 Since under the provisions of the trust agreement, upon the death of Edward A. Smith the income of the $100,000.00 trust fund originally provided for his benefit was payable to his widow during her lifetime after the death of decedent, upon the death of Edward A. Smith, his widow, Virginia Winslow Smith, became entitled to the income of his said trust fund upon decedent's death. It therefore became necessary to secure her consent to any termination or alteration of the trust of March 3, 1927. Acting on decedent's behalf and representing her, Sellar Bullard approached Virginia Winslow Smith, said life tenant in remainder, to secure her consent to a revocation or termination of said trust. She was at first non-commital, but upon seeking the advice of her attorney, she refused to consent to any action which would terminate or alter the interest which she held under the trust agreement.

Upon being informed of Virginia Winslow Smith's attitude in regard to the trust, decedent stated her intention to have the trust declared void, notwithstanding Virginia Winslow Smith's position. To effect this purpose she instructed her attorney to prepare and file a bill to declare the trust void on the ground of misrepresentation and fraud in the inducement of the trust by her son, Edward A. Smith,—the misrepresentation and fraud being his leading her to believe at the time of its execution that the trust was revocable by her at any time.

This bill was prepared by decedent's attorney and read by him to the decedent in the presence of her two daughters

59 and Sellar Bullard, her son-in-law. Decedent then signed the bill.

Decedent's daughter, Mrs. Bullard, however, became exercised over the filing of a bill containing allegations with reference to her deceased brother, Edward, which, though true, were undesirable, and felt that if decedent fully realized the purport of such allegations she would not wish to have the family linen so washed in public.

Mrs. Bullard conferred with her sister, Mrs. Cowan, and it was then suggested by them to decedent that some other method of terminating the trust of March 3, 1927, would be more advisable than the filing of the bill which had been prepared. The daughters and Mr. Bullard had in mind a plan of termination of the trust which had been suggested to them

by decedent's attorney, Mr. Samuel S. Holmes,—that a friendly suit be brought to terminate the trust on some legal technicality and that a decree be entered therein by consent of the parties.

As the result of this suggestion decedent instructed Mr. Bullard to carry on negotiations with Virginia Winslow Smith, widow of Edward A. Smith, and life beneficiary after the death of decedent under the trust of March 3, 1927, to pay her whatever was necessary to get her consent to the termination of the trust and to get her out of the family affairs.

Decedent stated that she wished to settle this matter
60 without any family row and that she would be willing to pay either a cash sum or anything else within reasonable limits in order to get the consent of Virginia Winslow Smith to the termination of the trust.

These instructions of decedent were communicated to her attorney, and in pursuance thereof he prepared a second bill to declare the trust void on the ground that certain provisions thereof were in violation of the rule against perpetuities. This bill was submitted to Mr. Bullard by the attorney, with the advice that the consent of all the adult beneficiaries under the trust of March 3, 1927, would have to be secured in order to effect the termination of said trust, and that in order to have a consent decree entered that would be binding on the interests of the minors under the trust, adequate provision would have to be made in substitution for the interests which they would lose as the result of the termination of said trust.

Upon submission of this matter to decedent she made a proposal to the beneficiaries under the trust of March 3, 1927, as to what she would do if they gave their consent to the termination of the trust. This proposal was to execute a new will which would eliminate from her then existing will $53,000.00 of bequests to persons other than the immediate family, and under which will she would make gifts of $25,000.00 to each of decedent's three unmarried grandchildren, and of $15,000.00 to each of decedent's two married grandchildren,—the shares of the two latter to be equalized by
61 cash gifts to them of the difference between their respective bequests and those of the other grandchildren. Under the new will decedent would set up a new trust of $100,000.00 for each of her two daughters for life, with remainders to their respective children.

Under this proposal the grandchildren would receive more than they would be entitled to receive under the trust of

March 3, 1927, and under the then existing will. Decedent also proposed to the family that she would release her interest as to approximately one-third of the corpus of the trust of March 3, 1927, in consideration of the beneficiaries of said trust releasing their interests as to the other two-thirds of the corpus of said property, which two-thirds she would take back into her possession, the plan being that these releases would be effected by the friendly family suit.

Pursuant to decedent's proposals a family conference was held, at which an oral family settlement agreement was entered into by all the adult beneficiaries under the trust of March 3, 1927, except Virginia Winslow Smith, by which said beneficiaries agreed to consent to the entry of a decree terminating the trust of March 3, 1927, in consideration of the carrying out by decedent of her said proposals.

The bill prepared to declare the trust void on the ground of its violation of the rule against perpetuities was filed
62 in the Superior Court of Cook County, Illinois, on November 25, 1931.

A certified copy of this bill was introduced in evidence without objection as PETITIONER'S EXHIBIT 3, and identified by the witness.

Prior to the filing of said bill negotiations had been entered into between Mr. Bullard and decedent's attorney, Mr. Holmes, and Mr. Bentley, attorney for Virginia Winslow Smith, with regard to the securing of her consent to the entry of a decree in said action to terminate the trust of March 3, 1927. As the result of these negotiations Virginia Winslow Smith's attorney submitted the proposition that she would consent to the entry of a decree in an action to terminate the trust on March 3, 1927, if a new trust were created to consist of one-third of the securities constituting the trust of March 3, 1927, these securities to be assigned immediately to the trustee under the new trust, the said new trust to contain exactly the same provisions with respect to the interests of Virginia Winslow Smith as the then existing trust.

The two attorneys, Mr. Bentley and Mr. Holmes, prepared such a trust instrument, and the same was submitted to Mr. Bullard for his approval. This trust instrument was executed by Clara R. Smith on February 17, 1932.

A photostatic copy of this trust indenture was introduced in evidence without objection as PETITIONER'S EXHIBIT 4, and identified by the witness.

63 Simultaneously with the preparation of the new trust instrument, decedent's new will was prepared by her attorney, embodying the provisions of the family settlement agreement with respect thereto.

The original of this will, with the last page containing the testatrix's signature being torn across, was introduced in evidence without objection as PETITIONER'S EXHIBIT 5, and was identified by the witness.

An agreement was prepared by Virginia Winslow Smith's attorney, addressed to the Trustee, dated February 17, 1932, and signed by decedent on said date, which agreement was a release of Virginia Winslow Smith from liability for the trusteeship of her deceased husband, Edward A. Smith, under the trust of March 3, 1927.

A letter also was prepared by Virginia Winslow Smith's attorney, addressed to the Trustee, dated February 17, 1932, and signed by decedent on said date, which letter was a direction to the Trustee for the transfer by it of the securities to constitute the corpus of the new trust directly from the old trust into the new trust, upon the dissolution of the old trust by decree of court.

A letter was prepared by Sellar Bullard, addressed to the Trustee, dated February 17, 1932, and signed by decedent on said date, which letter contained instructions to the
64 Trustee to transfer back to decedent, upon the consent decree terminating the first trust being entered, the property held by the Trustee under the first trust which it was not instructed by decedent to transfer directly into the second trust.

The three latter documents were introduced in evidence without objection as PETITIONER'S EXHIBITS 6, 7 and 8, respectively, and were identified by the witness.

Mr. Bullard, acting as decedent's agent and representative, sent the new trust indenture, the new will, and the aforesaid three letters to decedent at her winter home in California for her execution, and all of them except the will were executed by her and returned to Mr. Bullard about February 20, 1932. Mr. Bullard had instructed decedent not to sign the new will until she should be informed by him that the consent decree terminating the trust of March 3, 1927, had been entered. Upon receipt of these documents decedent wrote to Mr. Bullard going over the whole matter and stating that she would not sign the will until matters were settled with regard to the trust of March 3, 1927. This letter was introduced in

evidence without objection as PETITIONER'S EXHIBIT 19, and identified by the witness.

During the time when the documents necessary to carry out the provisions of the family settlement agreement were in preparation, decedent was in California, and Mr. Bullard acted as her representative and agent in the negotiations
65 incident to the carrying out of the family settlement agreement and the termination of the trust of March 3, 1927. Having had the necessary documents prepared pursuant thereto, he exchanged correspondence with decedent in Santa Barbara, California, receiving instructions and giving information concerning the progress of the negotiations to terminate the trust of March 3, 1927, and to carry out the other provisions of the family settlement agreement. This correspondence, consisting of letters or carbon copies thereof, and telegrams, was identified by the witness and introduced in evidence without objection as PETITIONER'S EXHIBIT 11-19, inclusive.

After receipt from decedent or her agent in California of the executed trust under date of February 17, 1932, and the other documents signed by decedent on the same date, Mr. Bullard retained them in his possession until the date of the hearing in the action to terminate the trust of March 3, 1927.

On February 25, 1932, a hearing was had in the Superior Court of Cook County, Illinois, in the action to terminate the said trust. Mr. Bullard was present in court at the time of said hearing. No witnesses were called and no evidence introduced, but the matter was submitted to the court. Mr. Bullard had in his possession in court the second trust instrument of February 17, 1932, and the letters of instruction of decedent to the trustee, all of which at that time he
66 delivered to Mr. Fairweather, representative of the Trustee, together with checks in payment of Trustee's fees. At the same time he delivered to Mr. Bentley, attorney for Virginia Winslow Smith, decedent's release of Virginia Winslow Smith from liability under the trusteeship of her deceased husband, Edward A. Smith.

All of the parties were present in court at the time that the decree was signed, Mr. Bullard, Mr. Holmes, Mr. Fairweather, Mr. Bentley and Mr. Concannon.

The decree terminating the trust was not entered by the court on February 25, 1932, but was entered at a subsequent hearing on February 27, 1932. A certified copy of this decree

was introduced in evidence without objection as PETITIONER'S EXHIBIT 20.

Immediately after the entry of the decree terminating the trust of March 3, 1927, decedent, in California, was notified thereof by Sellar Bullard, and on March 8, 1932, upon her return to her home in Santa Barbara, California, from a trip, she executed her new will, which had been prepared in pursuance of the terms of the family settlement agreement, and mailed to her in California. This will was witnessed by persons resident in California. Upon decedent's return to her home in Highland Park, Illinois, and on September 10, 1932, she executed a new will identical in all provisions with the will of March 8, 1932, executed in California, but witnessed by persons resident in Illinois. The purpose of
67 this re-execution was to facilitate probate in Illinois.

The will of March 8, 1932, was then destroyed. The will of September 8, 1932, was decedent's will in effect at the time of her death.

The last will and testament of decedent dated September 10, 1932, was introduced in evidence without objection as PETITIONER'S EXHIBIT 21, and was identified by the witness.

In pursuance of decedent's letter to the Trustee, dated February 17, 1932 (Petitioner's Exhibit 8) in which the Trustee bank was instructed to deliver two blocks of one hundred shares each of American Can Company preferred stock to Kennett Cowan, Jr. and Lora Cowan Ruehrdantz, representing the immediate gifts of $10,000.00 each to said grandchildren, Mr. Bullard received these securities from the Trustee and personally delivered them to said respective parties on April 7, 1932, and received their receipt for same.

On cross-examination Mr. Bullard testified that the income from the new trust of February 17, 1932, was paid to Clara R. Smith until the time of her death.

MATTHIAS CONCANNON:

Matthias Concannon testified that he is a lawyer practising in the City of Chicago; that in November, 1931, a certain bill was filed in the Superior Court of Cook County, Illinois, entitled Clara R. Smith, Complainant *vs.* Continental Illinois National Bank and Trust Company, as successor trustee,
68 et al; that in said action he was appointed guardian ad litem for Paul Charles Cowan and Clara Jean Bullard,

who were infant defendants in said cause. Mr. Concannon represented these defendants in said action and filed the formal answer usually filed by guardians ad litem in Cook County, Illinois, neither admitting nor denying the allegations of the bill but submitting the rights and interests of the parties to the protection of the court.

This case came on for hearing upon February 25, 1932, on which date Mr. Concannon, representing said infant defendants, attended court. At said hearing there were present, in addition to the court, Mr. Bullard, Mr. Samuel S. Holmes, attorney for decedent, Mr. David Rosenthal, representing the trustee bank, an employee of the bank, Mr. W. F. Peter, and an attorney representing Virginia Winslow Smith, life beneficiary in remainder under the said trust.

There was a rather informal hearing. Mr. Concannon made the principal statement to the court, stating generally what the provisions of the trust instrument in the case were and the particular clause out of which the question of the violation of the rule against perpetuities arose; that the principal legal question was not whether a perpetuity was created by the trust, because Mr. Concannon felt rather confident that there was one clause of the trust which violated the rule against perpetuities, but admitting that the rule
69 against perpetuities was violated by that provision of the trust, the following legal question arose: Did only the particular limitation which offended against the rule fall, or did the $100,000.00 trust fund which was created for the benefit of Edward A. Smith under the trust fall, or did all the provisions of the trust fall? Mr. Concannon stated to the court that he felt that the questions as to the construction of the said trust instrument on said point were very doubtful and debatable questions which would involve the estate in considerable litigation; that he understood that decedent, the complainant in said action, had agreed to make certain gifts by will in favor of her grandchildren if this trust were set aside, and was also going to create a similar trust to that originally created for the benefit of the other beneficiaries under the said first trust with similar interests limited over to the children of her two daughters in similar amounts to those under the first trust; that it would probably be to the practical advantage of the particular infants whom Mr. Concannon represented that the decree prayed for in the bill of complaint be entered.

Mr. Concannon, previous to his appearance in court on

said date, had investigated the family agreement which had been entered into between the beneficiaries under the trust of March 3, 1927, and had satisfied himself that such agreement was for the benefit of the minors whom he represented. He testified that it had been stated to him positively before
70 the said hearing that the said family agreement was going to be carried out.

There was no cross-examination.

RICHARD BENTLEY:

Richard Bentley testified that he is a lawyer practising in the City of Chicago, Illinois; that he is a member of the firm of Cassels, Potter & Bentley, and that he had been employed to represent Mrs. Virginia Winslow Smith; that he was first so employed in the fall of 1931 indirectly through counsel representing Mrs. Smith in Boston, Massachusetts, who wrote to him presenting some questions for examination under the law of Illinois relating to a trust in which Mrs. Smith was a beneficiary; that his particular employment had reference to a family dispute with respect to that trust.

The attorney for the decedent, Clara R. Smith, communicated with Mr. Bentley in an effort to settle Virginia Winslow Smith's interest under that trust. As the result of negotiations between Mr. Bentley and decedent's attorney, an agreement was arrived at that a hearing would be had in court upon a bill to dissolve the trust of March 3, 1927, under which Virginia Winslow Smith was life beneficiary after the death of decedent, which hearing was to result in the entry by the court of a decree which would decree the return to de-
71 cedent, the grantor of said trust, of the assets contained in it, and immediately thereupon, on the entry of the decree, a new trust, which theretofore would have been executed by decedent, would become effective, and the Trustee under the first trust of March 3, 1927, was to retain under the trust set up by the new instrument, the securities representing that part of the said first trust in which Virginia Winslow Smith had an interest, so that the result would be, so far as Virginia Winslow Smith was concerned, to substitute an interest in the new trust which was to be identical with the interest which she had under the old trust. Before arriving at this agreement, Virginia Winslow Smith refused even to entertain a suggestion to dissolve the first trust without her interest therein being preserved identically as it existed

under the said first trust. Her position was that she was not to give up anything which she already had.

Mr. Bentley was present in court at the hearing in the action to dissolve the trust of March 3, 1927, on February 25, 1932. On this date the executed trust instrument of February 17, 1932, prepared in accordance with the agreement between decedent and Virginia Winslow Smith, and the letter of instructions of decedent to the Trustee with reference to the transfer of securities from the old trust to the new trust, which letter had been prepared in Mr. Bentley's office, both having been duly executed by Clara R. Smith, were present in court. On that date these documents were delivered to
72 Mr. Fairweather, who represented the Continental Illinois Bank, trustee under the two trusts. Mr. Bentley testified that these documents were delivered to the Trustee prior to the signing of the decree terminating the first trust, because he and Virginia Winslow Smith would not have consented to the entry of the decree if the said trust and letter of instructions had not been delivered prior thereto.

There was no cross-examination.

A certified copy of the Answer filed on behalf of Virginia Winslow Smith in the action to terminate the trust of March 3, 1927, was introduced in evidence without objection as PETITIONER'S EXHIBIT 10.

VIRGINIA WINSLOW SMITH:

Virginia Winslow Smith testified that she is the widow of Edward A. Smith; that her home is in Highland Park, Illinois; that either in September or the first part of October, 1931, Mr. Sellar Bullard, representing the decedent, Clara R. Smith, asked her to give her consent to the entry of a decree in court which would destroy the trust of March 3, 1927. She refused to give such consent, and subsequently employed Mr. Bentley as her attorney to represent her in the matter.
73 She further testified that she had heard Mr. Bentley's testimony as to what transpired on his part in representing her interest under said trust, and that his testimony with regard to same was correct.

Virginia Winslow Smith further testified that she was born on March 14, 1887.

There was no cross-examination.

H. J. FAIRWEATHER:

H. J. Fairweather testified that he is assistant secretary of Continental Illinois National Bank and Trust Company; that as assistant secretary he had been in charge of the trust known as the Clara R. Smith Trust, dated March 3, 1927. The Continental Illinois Bank and Trust Company acted as successor trustee under the trust of March 3, 1927, after its merger with the Illinois Merchants Trust Company until the date of entry of the decree terminating said trust. Mr. Fairweather stated that he had in his possession a list of the securities constituting the first trust of March 3, 1927, as of February 17, 1932; that there was no change in the securities constituting the corpus of the said trust subsequent to said date, and that said list showed the true condition of the securities in said trust as of February 17, 1932; that the securities held by the bank as trustee under the trust of March 3, 1927, on February 17, 1932, were—

74 280 shares Addressograph - Multigraph Corporation common stock;
1824 " American Can Company preferred stock;
500 " Firestone Tire & Rubber Company common stock;
100 " Great Northern Railway Company preferred stock;
552 " International Harvester Company common stock;
75 " National Biscuit Company preferred stock;
700 " Union Pacific Railroad Company common stock;
1 certificate of interest in Drylith Patents owned by American Multigraph Company.

Mr. Fairweather further testified that there was no change or sale of any of these securities prior to February 27, 1932; that he was present in court on February 25, 1932, at the time of the first hearing in the action of Clara R. Smith to terminate the trust of March 3, 1927; that prior to the entry of the decree terminating the trust of March 3, 1927, there were delivered to him the executed trust instrument of February 17, 1932, and the letters of instruction of decedent to the Trustee as to the disposition of the securities in the old trust (Petitioner's Exhibits 7 and 8), to be effective on the dissolution of that trust by the entry of the decree.

In pursuance of the instructions contained in decedent's letter of February 17, 1932, with reference to disposition of the securities constituting the corpus of the trust of March 3, 1927, other than those which were to be transferred into the trust of February 17, 1932, Mr. Fairweather caused these securities to be transferred in accordance with said instructions. Mr. Fairweather caused one hundred shares of American Can Company stock to be transferred out of the
75 corpus of the trust of March 3, 1927, directly to the name of Kennett Cowan, Jr., and one hundred shares of said stock directly to the name of Lora Cowan Ruehrdantz, in accordance with directions contained in decedent's letter (Petitioner's Exhibit 8). The remainder of the said securities which were not to be transferred into the said second trust of February 17, 1932, were transferred by Mr. Fairweather directly to decedent, in accordance with instructions contained in her letters (Petitioner's Exhibits 7 and 8), and were delivered by him to Sellar Bullard as agent for decedent.

In accordance with the letter of instructions as to the disposition of the securities constituting the corpus of the trust of March 3, 1927, which were to be transferred to the trust of February 17, 1932 (Petitioner's Exhibit 7), Mr. Fairweather caused said securities to be transferred by the bank as trustee out of the first trust of March 3, 1927, directly to the bank as trustee under the second trust of February 17, 1932, without said securities being transferred to the name of decedent, Clara R. Smith. The income from the new trust of February 17, 1932, was paid to decedent from and after February 27, 1932, until the time of her death.

There was no cross-examination.

76 WILLIAM F. PETER;

William F. Peter testified that he is a lawyer practising in the City of Chicago; that he is Assistant General Counsel of the Rock Island Railway; that he was employed in the case of Clara R. Smith *vs.* Continental Illinois Bank and Trust Company, as successor trustee, *et al.*, Number 54763, in the Superior Court of Cook County, Illinois, in the year 1931, to represent nine adult defendants in that action, and that he filed the answer of said defendants in said suit. A photostatic copy of said Answer was introduced in evidence without objection as PETITIONER'S EXHIBIT 9 and was identified by the witness.

Mr. Peter was approached in the first instance by M
Sellar Bullard, who told him that he wanted him to repr
sent these adult defendants. Mr. Peter later talked to h
clients in regard to the subject-matter of the action. It w
explained to him by them that a trust had been created
Clara R. Smith in 1927; that she was contemplating filing
suit to have that trust declared void on some legal groun
but that in lieu thereof a family settlement had been reache
to effectuate which it was necessary to have this trust agre
ment set aside; that that could not be done voluntarily b
cause of the existence of minors in interest; that a suit wou
have to be brought for that purpose, and that it was in co
nection with that suit that Mr. Peter was asked to repr
77 sent the adult defendants.

Mr. Peter explained to his clients the effect of t
entry of such a decree on their interests under the old tru
and what they would get in lieu thereof under the fami
agreement. He told them that the decree would destroy
their interests under the old trust except as the agreeme
would take care of that situation.

Mr. Peter was advised by his clients concerning the fami
agreement, and an outline of same was supplied to him. M
Peter further testified that his clients were perfectly satisfi
with the terms of said agreement.

There was no cross-examination.

SAMUEL S. HOLMES:

Samuel S. Holmes testified that his home is in Highlan
Park, Illinois; that he is an attorney practising in Coo
County, Illinois, and is a member of the firm of McNa
Holmes & Long, in the City of Chicago.

Mr. Holmes further testified that he was the attorney re
resenting decedent, Clara R. Smith, as well as several oth
members of the Smith family, except Virginia Winslo
Smith, on occasion. He consulted with decedent in re
78 erence to the trust of March 3, 1927, about the midd
or latter part of September, 1931. Decedent requeste
him to give her his opinion as to whether she had a right
revoke the trust, particularly in view of the fact that h
son, Edward A. Smith, had represented to her at the tim
of the execution of said trust that she could take back th
money, as she phrased it, at any time she wished.

Mr. Holmes gave here his opinion that the trust by i

terms was irrevocable, but that if it could be shown that Edward A. Smith, her son, had made misrepresentations to her, either by mistake or through fraud, at the time of the execution of the trust, which misrepresentations induced her to execute the trust, the trust could doubtless be destroyed by decree of court.

At the same time, Mr. Holmes advised decedent that the terms of the trust were very long and complicated, and in many ways contradictory and not clear, and he believed that upon a bill being filed in court by her on some legal ground, such as the invalidity of any part of the trust due to a violation of the rule against perpetuities, upon the written consent of all the adult beneficiaries of the trust, and upon a showing to the court that the interests of the minors were provided for in some other way in lieu of their interests under the trust, the court would doubtless enter a decree declaring the trust to be invalid.

As a result of Mr. Holmes' first conference with de-
79 cedent she instructed Mr. Sellar Bullard in Mr. Holmes' presence, to ask various adult members of the family to consent to the entry of a decree in a friendly suit such as was contemplated in Mr. Holmes' second suggestion. Virginia Winslow Smith, however, refused to enter her consent to such a suit, and as the result of such refusal decedent instructed Mr. Holmes to prepare a bill to declare the trust void on the ground that there had been a misrepresentation made by her son, Edward A. Smith, to induce her to sign the trust at the time she signed it. Mr. Holmes prepared such a bill. A copy of this bill was identified by the witness and introduced in evidence without objection as Petitioner's Exhibit 23. This bill never was filed in court for the reason that when it was read to decedent in the presence of Mr. Sellar Bullard and decedent's two daughters, Mrs. Bullard and Mrs. Cowan, both Mrs. Bullard and Mrs. Cowan became very much exercised as to the effect of the filing of such a bill, because of the fact that it would bring into the open all of the disputed matters in the family.

On the same evening that the bill was read by Mr. Holmes to decedent, Mrs. Bullard asked Mr. Holmes to see her the next day, before anything could be done, and not to file the bill. Pursuant to that request, Mr. Holmes went to Mrs. Bullard's home and had a long talk with her, in which she said that she was speaking for her sister, Mrs. Cowan, and

her sister's children, as well as for herself and her own
80 children, and she asked Mr. Holmes to use his influence with her mother, the decedent, not to file that bill, and to get her mother to consent to buy out the interest of Virginia Winslow Smith under the trust of March 3, 1927, so that Virginia Winslow Smith would give her consent to the entry of a decree in a friendly suit to terminate said trust on some other basis than the basis of the bill which Mr. Holmes had prepared.

Mr. Holmes also consulted with Mr. Bullard, Mrs. Bullard, and the various grandchildren, on numerous occasions, they being at Mr. Holmes' residence, or he being at theirs, an average of two or three times a week during the entire time of the working out of an agreement among the members of the family, from September, 1931, until the following March.

In company with Mr. Bullard, Mr. Holmes interviewed Mr. Walter Eckert, the lawyer who had drawn up the trust instrument of March 3, 1927. Mr. Holmes and Mr. Bullard questioned Mr. Eckert concerning his advice to Edward A. Smith, as to whether the trust was irrevocable. Mr. Holmes testified that Mr. Eckert stated in no uncertain terms that he had advised Mr. Smith that the trust was irrevocable and that inasmuch as it did not save taxes, because the case of *May* v. *Heiner* had not been decided at that time, Mr. Eckert was under the impression that because the trustor had reserved a life interest to herself under it, the trust, al-
81 though irrevocable, was still taxable; that at the time the trust had been drawn by Mr. Eckert, *May* v. *Heiner* had not been decided, nor the McCormick and Northern Trust cases, and he advised Mr. Smith that he was not saving any taxes by reason of making the trust irrevocable.

Upon reporting this conversation to decedent, she told Mr. Holmes that her son had made the representation to her that the money could be taken back at any time, on the theory that he as trustee of the trust would undoubtedly outlive her, and that if she asked him for it he would give it back to her. She further stated that she did not want to be put in the position of having to testify to any fraud or misrepresentation made to her on the part of her son, and she then instructed Mr. Holmes to prepare a bill asking that the trust be declared void on some other ground than that of fraud or misrepresentation of her son.

Mr. Holmes then prepared a bill on the theory that there was a violation of the rule against perpetuities in one of the

provisions of the trust. This bill (Petitioner's Exhibit 3) was filed by Mr. Holmes.

Mr. Holmes negotiated with Virginia Winslow Smith and with her attorney, Mr. Bentley, with regard to her interest under the trust of March 3, 1927. During all the negotiations with Mr. Bentley, from November 20, 1931, until the entry of the decree terminating the trust of March 3, 1927, on February 27, 1932, Mr. Bentley took the position that
82 Virginia Winslow Smith would not consent to the entry of any decree destroying said trust which would jeopardize her interest in the slightest, and was determined that her interest be preserved *in toto* as it existed under said trust. Mr. Bentley also took the position that there was no violation of the rule against perpetuities in any of the provisions of the trust of March 3, 1927, but that the trust was sound and valid.

Mr. Bentley and Mr. Holmes finally agreed that if decedent would release her interest as to one-third of the property constituting the corpus of the trust of March 3, 1927, and the other beneficiaries of said trust would release their interest as to two-thirds of it, Virginia Winslow Smith would join in that release by the other beneficiaries. Mr. Holmes proposed that that release take the form of a new trust indenture to be executed by decedent and delivered prior to the entry of the decree terminating the first trust.

That trust indenture was prepared and is the trust agreement dated February 17, 1932 (Petitioner's Exhibit 4). This trust indenture was prepared by Mr. Holmes and sent by him to Mr. Bentley with his suggestions attached, and returned to Mr. Holmes by Mr. Bentley, and prepared in Mr. Holmes' office in its final form.

The consent of Virginia Winslow Smith to the entry
83 of a decree in the action to terminate the trust of March 3, 1927, was conditioned upon the second trust of February 17, 1932, being created.

Mr. Bentley did not file the answer of Virginia Winslow Smith in the action to terminate the trust of March 3, 1927, until the case was called for hearing on February 25, 1932, and the release of Virginia Winslow Smith from liability under the trusteeship of Edward A. Smith, the documents, letters of instructions to the trustee, dated February 17, 1932, and the executed trust instrument of February 17, 1932, had been delivered to Mr. Fairweather representing the trustee, by Mr. Sellar Bullard, representing decedent. A decree was entered in the suit to terminate the trust of March 3, 1927.

on February 27, 1932. All the papers necessary to the carrying out of the family settlement agreement were delivered prior to the entry of said decree, having been delivered at the first hearing, on February 25, 1932.

After the hearing had been held on February 25, 1932, the court indicated that it would enter the decree, but stated that it did not want to enter it without the intervention of one day between the hearing and the actual entry of the decree, so the papers were all delivered to Mr. Fairweather and to the various other persons entitled to receive them, and the hearing was adjournment until February 27, 1932, at which time the court entered the decree formally.

84 The entry of the decree was the final step, so far as the destruction of the trust of March 3, 1927, was concerned, but decedent's new will was not executed by her until she was notified in California of the entry of the decree. She then executed the new will, and it was returned to Mr. Bullard in Chicago about March 10th or 12th, 1932.

There was no cross-examination.

Documents designated as Exhibits 1 and 1-A to 23 inclusive were introduced and received in evidence and are hereby made a part of this Statement of Evidence.

Samuel S. Holmes,
Samuel S. Holmes.
Lorentz B. Knouff,
Lorentz B. Knouff,
Attorneys for the Petitioner.

The respondent agrees that the foregoing, together with said Exhibits, is a correct and complete statement of the evidence material to the errors assigned in the Petition for Review filed by Sellar Bullard, as Executor, etc., and agrees that the same may be settled and approved and made a part of the record in this cause, without further notice to him of the lodging or presentation thereof.

Herman Oliplant,
Attorney for the Respondent.

Certificate to Statement of Evidence.

The foregoing statement of evidence is settled and approved and made a part of the record in this cause this 11th day of November, 1936.

(s) Ernest H. Van Fossan,
Member, United States Board of Tax Appeals.

85 EXHIBIT 1.

Filed at Hearing Feb. 13, 1935.

This Agreement, Made this 3rd day of March, A. D. 1927, between Clara R. Smith of the City of Highland Park, County of Lake and State of Illinois (hereinafter for convenience referred to as "Depositor"), and Edward A. Smith, son of Depositor, also of the City of Highland Park, County of Lake and State of Illinois (hereinafter for convenience referred to as "Trustee") Witnesseth:

First: That the Depositor for and in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations to her in hand paid by the Trustee, the receipt whereof is hereby acknowledged, does hereby and by these presents, grant, bargain, sell, convey, assign, set over, release, quit-claim and deliver unto the Trustee all and singular, the property whether the same be real, personal or mixed, in and to:

130 shares of International Harvester Company Common Stock,
75 shares of National Biscuit Company Preferred Stock,
100 shares of Great Northern Railway Company Preferred Stock,
1824 shares of American Can Company Preferred Stock,
700 shares of Union Pacific Railroad Company Common Stock,
200 shares of American Multigraph Company Stock,
100 shares of Firestone Tire and Rubber Company Common Stock,

To have and to hold the same unto the said Trustee for the following uses and purposes, namely:

The Trustee shall take possession of all of said property, whether real, personal or mixed, and hold, manage, care for, control, invest, and re-invest said trust estate in the name of the Trustee in any real, personal or mixed property, which to the Trustee shall seem advisable, including bonds, stocks, mortgages, notes, securities, real estate and/or any other property, whether real, personal or mixed, which to the Trustee may seem best, with power to vary the investment or investments of said trust estate for any other or others of the character above specified in the discretion of said Trustee, and said Trustee is further authorized and empowered to

manage, care for, improve, protect, insure, control, deal with and dispose of said trust estate or any part thereof in his discretion, in any and every way in which an owner thereof could manage, care for, improve, protect, insure, control, deal with and dispose of the same. The Trustee shall have full power as to any real estate which may be held by him to lease or demise the same from time to time, or any part or parts thereof with the improvements thereon or to be erected thereon, for any period or periods not exceeding, however, the period of 198 years; and the said Trustee shall have full power to contract to sell, to sell on any terms, to convey with or without consideration, to mortgage, pledge or otherwise encumber such trust property with the improvements thereon or to be erected thereon, to partition or to exchange said premises, or any part or parts thereof, for other
86 real or personal property, incumbered or unincumbered, and to re-partition or re-exchange such property, or any part or parts thereof as often as desired, and to sell, contract to sell, lease, by leases to commence in praesenti or in futuro, and sublease, assign, mortgage, pledge, dispose of, convert and reconvert, and in general to deal with such property, or any part or parts thereof, whenever and howsoever, and as often as desired, to grant easements or charges of any kind, to make contracts or agreements for party walls or in relation thereto or for building or building restrictions or in relation thereto or otherwise, to release, convey or assign any right, title or interest in or about said premises, or any part or parts thereof, to give consent on behalf of said premises, or any part or parts thereof, to any use of the streets, alleys, parks, or public places, for railroads, street railroads, gas or electric light poles, lines, pipes, conduits or other equipment or other public, or semi-public improvement or use, to erect, repair, remodel and reconstruct building, improvements, etc., upon said premises, or any part or parts thereof, to construct sidewalks and to grade, fill, curb and pave streets, and alleys, to lay and maintain sewer, water and gas pipes, etc., and do all other work and make all other improvements in streets and alleys as said Trustee may desire, all by private contract, and also to petition any properly constituted municipal corporation for the construction of any sidewalk, or for any street or other public or semi-public improvement or use. Said Trustee shall also have full right and power to grant any and all rights and to lease, sublease, sell, assign and otherwise dispose of any right, title or interest concerning or

in relation to sub-sidewalk spaces or concerning or in relation to any part of the streets and alleys adjacent to their trust property, and to deal with said premises and every part thereof in all other ways and for such other considerations as it would be lawful for any person owning the same to deal with the same, whether similar to or different from the ways above specified at any time or times hereafter. All of the foregoing recitals of the powers of the Trustee are inclusive and not restrictive.

Said Trustee shall have no responsibility as to the validity or value of, nor shall he be liable for any loss arising from any investments made with the written approval of the Depositor or in accordance with the provisions hereof. Neither shall said Trustee or his successor or successors be personally liable in any matter or in general hereunder unless they shall be guilty of malfeasance or willful negligence in the premises herein.

Second: The Depositor may from time to time in her discretion add to said trust estate, and include therein, any additional property, real, personal or mixed, such additional property to be described in a schedule or schedules and attached hereto, entitled "Schedule of property of the
87 Clara R. Smith Trust", which said schedule or schedules shall bear the signature of the Depositor.

The Schedule or schedules so attached to this agreement, and the property therein described, shall be made a part hereof with the same force and effect as if such property were described in detail herein, and included as a part of the property set forth under property described in paragraph "First" and shall be held by said Trustee in Trust, under the same terms and conditions as though such addition or additions to said trust property were deposited by the Depositor as part of the original deposit made hereunder.

Third: Out of the income derived from the property belonging to said trust estate (whether such income be from rents, interest or otherwise), said Trustee shall first pay all the necessary costs and expenses of the Trustee and of this trust. He shall also make all payments of principal, interest or other sums falling due on any personal property or real estate owned or purchased by said trust estate at any time, or in which the trust estate is interested, and shall pay any other sums which the Trustee may deem necessary for the best interests of said trust estate. Said Trustee shall from time to time set aside from such income such sum or sums

as he may deem advisable for the purpose of paying in full or in part any mortgage on said trust estate, or of any part thereof and for the purpose of establishing a reserve for depreciation of buildings which may form a part of said trust estate at any time. Pending the application of the funds, so reserved, to the payment or reduction of a mortgage or mortgages of, or to the restoration or rebuilding of buildings on real estate forming a part of the trust estate, such funds may be invested and reinvested in like manner as other funds of the trust estate and the income arising therefrom shall be subject to all of the provisions hereof with reference to income from said trust estate. The principal of such reserve funds shall be applied from time to time by said trustee to the payment or reduction of mortgages of real estate or to the payment or reduction of mortgages of leasehold interests in real estate forming a part of the trust estate or to the restoration or rebuilding of buildings thereon or erected thereon. In case any part of such reserve funds remains unexpended at the termination of this trust it shall be distributed in the same manner as if it were a part of the corpus of the trust estate. Said Trustee shall also have the right to set aside from time to time such an amount or amounts as he may deem necessary for the proper handling and protection of the Trust Estate, and the balance of the income which shall hereafter be designated as "net income" shall during the life time of the Depositor be paid to her as the same is received by said Trustee.

Fourth: In the event that the income derived from this trust and herein provided to be paid to the depositor should be insufficient at any time to maintain the depositor in
88 the manner in which she is accustomed to live at the time of the execution of this agreement, then the Trustee shall have full right and power to pay to the said Depositor from time to time, as he shall see fit such part of the principal of this trust estate as may in his opinion be necessary to so maintain her as she was accustomed to live at the time of the execution of this agreement. Said Trustee shall also have the right to and with the consent of the Depositor to make partial distribution of principal from time to time to either or any of the Depositor's children or others named as beneficiaries hereunder in such amounts as the Depositor and said Trustee may see fit.

Fifth: Upon the death of the Depositor or as soon thereafter as is practicable, said Trustee shall first set aside in

property or securities the sum of Three Hundred Thousand ($300,000.00) Dollars which sum shall be devided into three equal parts, and thereafter said Trustee shall hold such shares in three separate and distinct trusts; one of said shares for Depositor's daughter, Lora Smith Cowan, as hereinafter provided; one of said shares for Depositor's daughter, Bessie Smith Bullard, as hereinafter provided; and one of said shares for Depositor's son, Edward A. Smith, as hereinafter provided, administering the said three trusts and disposing of the three respective trust estates in severalty, separate and distinct from each other in manner following, to-wit:

Said Trustee shall pay the net income from each of said shares to the respective child for whom said trust is set aside for and during the lifetime of such child. Such income to be paid to such child either monthly, quarterly, or semi-annually as said Trustee may elect and as shall be for the best interests of this trust (the wish of the Depositor but not her direction being that such income be paid quarterly).

Upon the death of Depositor's daughter, Lora Smith Cowan, then the income from said sum so set aside for her shall be paid to her children share and share alike until the youngest of her present children attains the age of twenty-six years, or if deceased, then when such child if living would have arrived at said age at which time the principal of said trust estate shall be divided among the children of Depositor's said daughter share and share alike. It being the intention that in the event that all of the children of Depositor's said daughter have arrived at the age of twenty-six years prior to her decease that then distribution of said principal shall be made immediately after her decease. In the event of the death of any of her said children prior to the time of the distribution of the said principal sum hereunder, then the income shall be paid to the heirs-at-law of such deceased child or children according to the present laws of
89 descent of the State of Illinois until time for the final distribution of said sum whereupon said principal sum shall likewise be paid to said heirs-at-law of such deceased child or children.

Upon the death of Depositor's daughter, Bessie Smith Bullard, then the income from said sum so set aside for her shall be paid to her children share and share alike until the youngest of her present children attains the age of twenty-six years, or if deceased, then when such child if living would have

arrived at said age at which time the principal of said trust estate shall be divided among the children of Depositor's said daughter share and share alike. It being the intention that in the event that all of the children of Depositor's said daughter have arrived at the age of twenty-six years prior to her decease that then distribution of said principal shall be made immediately after her decease. In the event of the death of any of her said children prior to the time of the distribution of the said principal sum hereunder, then the income shall be paid to the heirs-at-law or such deceased child or children according to the present laws of descent of the State of Illinois, until time for the final distribution of said sum whereupon said principal sum shall likewise be paid to said heirs-at-law of such deceased child or children.

Upon the death of Depositor's son, Edward A. Smith, then the income from said sum so set aside for him shall be paid to his widow for and during her natural life unless he shall leave him a child or children surviving in which event said income shall be paid to such child or children until said youngest child arrives at the age of twenty years at which time the principal of said trust estate shall be divided among the children of Depositor's said son share and share alike. It being the intention that in the event that all of the children of Depositor's said son have arrived at the age of twenty years prior to his decease, that then distribution of said principal shall be made immediately after his decease. In the event of the death of any of his said children prior to the time of the distribution of the said principal sum hereunder, then the income shall be paid to the heirs-at-law of such deceased child or children according to the present laws of descent of the State of Illinois until time for the final distribution of said sum whereupon said principal sum shall likewise be paid to such heirs-at-law of such deceased child or children. In the event Depositor's said son shall leave him no child or children surviving, then the principal of said trust estate shall upon the death of both himself and his widow be paid one-half to the children of Depositor's daughter, Lora Smith Cowan, and one-half to the children of Depositor's daughter, Bessie Smith Bullard, the heirs-at-law of any deceased child to receive the part such deceased child would have received if living.

90 The remainder of said principal after the setting aside of said Three Hundred Thousand ($300,000.00) Dollars shall, upon the said death of the Depositor be divided into

three equal parts as nearly as is practicable or possible, quality and quantity considered, so that when said division is completed, each of said three shares shall be as nearly as is practicable of the same fair cash market value deducting, however, any payment on account of principal theretofore made (if any) to any of Depositor's child or children from such child or children's share, one of said parts shall be paid to each of said children of the Depositor, if living, and in the event of the death of any of said children prior thereto, then the share which such deceased child would have received, if living, shall be added to the principal of and become a part of the One Hundred Thousand ($100,000.00) Dollar trust herein created for such child so deceased.

Sixth: The Trustee reserves unto himself, the right to resign from this trust at any time upon giving five days' written notice of said resignation to the beneficiaries hereunder. In case of said resignation or in case of the death or other inability to act at any time of the said Trustee, then the Illinois Merchants Trust Company with its principal office in the City of Chicago and State of Illinois, shall act in his place and stead, and in the event of the resignation, removal, failure or refusal or inability of the said Illinois Merchants Trust Company to act, then a new Trustee shall be appointed in its place and stead, which said new trustee shall be appointed by a Court in Chancery in Cook County, Illinois, after notice to all parties in interest as is now provided for serving notice in chancery.

Seventh: For the purpose of making distribution, the Trustee or his successor is authorized and empowered to value and appraise any and all of said trust estate and to distribute the same in kind or in cash, as he, or it, may deem advisable, and any such valuation or appraisement, so made shall be valid and binding upon each and every beneficiary hereunder.

Eighth: All estate, inheritance and other taxes, and all deeds of transfer, charges, and acceptances, if any, which may be levied or incurred in and in connection with any payments or gifts under this agreement, shall be paid by the Trustee out of the corpus or unexpended net income of the trust estate subject to this agreement.

Ninth: In the event the Trustee shall be made a party to any litigation on account of the trust or the trust estate hereby created, such Trustee shall have a lien on such trust estate for all costs and expenses, including reasonable com-

pensation and reasonable attorney's fees, and shall be reimbursed from said trust estate therefor.

91 Tenth: Any present or future Trustee, or beneficiary may contract with the Trustee on the same basis as any other person.

Eleventh: No purchaser at any sale made by the Trustee under this indenture, shall be obliged to see to the application of the purchase money.

Twelfth: No part of the trust estate shall become vested until such time as the beneficiary or beneficiaries hereunder shall become entitled to the actual possession thereof; payment of income and principal provided for herein shall be made to the respective beneficiaries in person (except payments made to or for the benefit of minors) and then only upon their respective receipts and shall not be grantable, transferrable, or otherwise assignable in whole or in part by the voluntary or involuntary acts of the respective beneficiaries or by operation of law and shall not be liable for any obligation of the respective beneficiaries.

In Witness Whereof, the Depositor has hereunto set her hand and seal, and the Trustee has likewise hereunto set his hand and seal, all the day and year first above written.

Clara R. Smith,
(Seal) *Depositor.*
Edward A. Smith,
(Seal) *Trustee.*

92 State of Illinois, }
County of Lake. } ss.

I, Raymond L. Erskine, a Notary Public in and for said County in the State aforesaid Do Hereby Certify, That Clara R. Smith personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed and delivered the said instrument as her free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this 3rd day of March A. D. 1927.

Raymond L. Erskine,
Notary Public.

93 The under signed, Illinois Merchants Trust Company, named as successor in trust under the provisions of an

agreement dated March 3, 1927, between Clara R. Smith and Edward A. Smith, does hereby accept the appointment therein contained as successor to Edward A. Smith, named therein as Trustee, who died on December 16, 1928.

In Witness Whereof, the undersigned has caused these presents to be signed in its behalf by its proper officers, and its corporate seal to be hereunto affixed, this 24th day of January, A. D., 1929.

Illinois Merchants Trust Company,
By Name illegible
Vice President.

Attest:
Name Illegable
Assistant Secretary.

94 PETITIONER'S EXHIBIT 1-A.

Admitted in Evidence Feb 13 1935.

The undersigned, Illinois Merchants Trust Company, named as successor in trust under the provisions of an agreement dated March 3, 1927, between Clara R. Smith and Edward A. Smith, does hereby accept the appointment therein contained as successor to Edward A. Smith, named therein as Trustee, who died on December 16, 1928.

In Witness Whereof, the undersigned has caused these presents to be signed in its behalf by its proper officers, and its corporate seal to be hereunto affixed, this 24th day of January, A. D., 1929.

Illinois Merchants Trust Company
By Leon L. Liehy,
Vice President.

Attest:
(Name Illegible)
Assistant Secretary.

95 EXHIBIT 2.

(Filed at Hearing, Feb. 13, 1935.)

Know All Men By These Presents, That I, Clara R. Smith, of the City of Highland Park in the County of Lake in the State of Illinois, being of sound and disposing mind and memory, do hereby make, publish and declare this to be my last will and testament in manner following, that is to say:

First: I give and bequeath all my books, pictures, rugs, silverware, bric-a-brac, household furniture and furnishings, equipages, wearing apparel, jewelry, goods and chattels to my children, Bessie Smith Bullard and Lora Smith Cowan, in equal shares.

Second: I give and bequeath to the following persons the sums set opposite their respective names, to wit:

To my niece, Frances J. Wymond, Five Thousand Dollars ($5000.00);

To my niece, Marjory C. Neilson, Five Thousand Dollars ($5000.00);

To my nephew, Ward Small, Five Thousand Dollars ($5000.00);

To my nephew, Lawrence A. Small, Five Thousand Dollars ($5000.00);

To my nephew, Edward A. Small, Jr., Five Thousand Dollars ($5000.00);

To the niece of my deceased husband, Grace Crosby, Five Thousand Dollars ($5000.00);

To the niece of my deceased husband, Eugenia Moore, Five Thousand Dollars ($5000.00);

To the niece of my deceased husband, Mollie Dibble, Five Thousand Dollars ($5000.00);

To the niece of my deceased husband, Gertrude F. Barber, Five Thousand Dollars ($5000.00);

To the grandniece of my deceased husband, Clara Belle Rice, Five Thousand Dollars ($5000.00);

To the nephew of my deceased husband, Charles S. Barber, One Thousand Dollars ($1000.00);

To the nephew of my deceased husband, John O. Barber, One Thousand Dollars ($1000.00);

To the nephew of my deceased husband, Louis Crow, One Thousand Dollars ($1000.00);

To my chauffeur, John Zehren, Five Thousand Dollars ($5000.00);

To my friend, Ina G. Newell, Five Thousand Dollars ($5000.00);

Third: I give, devise and bequeath one-half (1/2) of all the rest, residue and remainder of my estate, to my daughter, Bessie Smith Bullard, to have and to hold to herself, her heirs and assigns forever, and the remaining one-half (1/2) of all said rest, residue and remainder of my estate to the Chicago Title and Trust Company and Sellar Bullard as Trustees to have and to hold upon the following mentioned trusts, that is to say:

(a) To receive, hold, manage and control the same; to invest and reinvest the principal and proceeds thereof; to collect the same and the income therefrom, and to sell, assign,
96 lease, exchange, encumber, mortgage, improve, partition, subdivide, dedicate and convey the said trust property, and every part thereof, as to said Trustees shall seem proper, and to sell, alter and change the investments thereof, from time to time, in their discretion, and to collect and receive all dividends, rents, issues, profits, income and increase therefrom until the final and complete distribution and payment thereof, as hereinafter provided; and in making and retaining investments, from time to time, I give to said Trustees as full and unlimited power and discretion as I would have had if I had remained living, not limiting said Trustee to such investments as Trustees are by law authorized to make, but giving them full power to make and to retain any other investments which they may deem desirable; and I give to said Trustees full power and authority to lease any of the real estate of said trust estate for any term or terms that said Trustees may deem proper, even if such term or terms extend beyond the period of the trust hereby created,—terms of ninety-nine (99) years, and upwards, as well as terms of shorter duration and I give to said Trustees full power and authority to do and to perform any and all other acts which they may deem proper for the carrying out of the purposes of this my will.

(b) To pay all costs, charges and expenses of said trust estate and of the management thereof, and all taxes and assessments thereon, and to receive and retain reasonable compensation for their services as Trustees.

(c) To pay all the net income from said estate, in quarterly installments, to my daughter, Lora Smith Cowan, for

and during the term of her natural life, and upon her death then to her issue share and share alike, per stirpes, until her youngest child now living arrives, or if not living, would have arrived at the age of twenty-five (25) years, whereupon this trust shall cease and determine and all the principal or corpus of said trust estate shall be conveyed and distributes to her issue, in equal parts, per stirpes; and if she leave no issue surviving, then to my heirs-at-law, according to the Statutes of Descent of the State of Illinois, then in force, and the time for determining who are my heirs as that words is here used, shall be the time for making distribution to them, and not the time of my death.

(d) No money or property payable or distributable by said Trustees under the provisions of this my will, shall be pledged, assigned, transferred, sold or in any manner whatsoever anticipated, charged or encumbered by any of the beneficiaries hereunder; or be in any manner liable, in the possession of said Trustees, for the debts, contracts or engagements of any of said beneficiaries.

(e) In making distribution of the principal or corpus of said trust estate, or any part thereof, said Trustees may make distribution to all or any of said beneficiaries in money or other property of said trust estate, and the judgment of
97 said Trustees as to what shall constitute a proper division among them, and their selection and valuation shall be binding and conclusive on all parties.

Fourth: I direct that all succession and inheritance taxes be paid out of the residuum of my estate as an expense of administration, and not out of the specific legacies or bequests.

Fifth: In case of the death, resignation, refusal or inability of said Sellar Bullard to act as Trustee under Article "Third" of this my will, I direct that said Chicago Title and Trust Company act as sole Trustee hereunder, and have all the powers, authority, discretion and duties conferred upon or entrusted to both the Trustees under said section "Third" of this my will.

Sixth: I hereby nominate and appoint said Sellar Bullard, and said Chicago Title and Trust Company, Executors of this my Last Will and Testament, and I direct that neither of them shall be required to give any bond or security for the faithful performance of the duties of Executor hereunder. I give unto them, as such Executors, full power and authority to sell, lease, exchange, encumber, and convey the whole or any part of my estate, either at public or private sale, to such

person or persons, for such price or prices, and upon such terms as to them shall seem best, and full power and authority to settle and compound any and all claims, either in favor of or against my estate, as to them shall seem meet, and for the purposes aforesaid, to execute and deliver all proper and necessary conveyances and to give full receipts and discharges.

Seventh: I am making no provision in this will for my daughter-in-law, Virginia Winslow Smith, the wife of my deceased son, Edward A. Smith, as she will take the income of a trust fund created for my said son in a living trust heretofore created for my three children.

Eighth: I hereby revoke all former wills by me made.

Witness my hand and seal this _____ day of August, A. D. 1929.

_____(Seal)

We Hereby Certify that the foregoing instrument consisting of three (3) typewritten pages, with this included, was, on the day of the date thereof, signed, published and declared by Clara R. Smith, the Testatrix, as and for her Last Will and Testament in the presence of us, who, at her request, in her presence and in the presence of each other, have subscribed our names hereto, as witnesses.

_____

_____

_____

_____

98 EXHIBIT 3.

Filed at Hearing Feb. 13, 1935.

State of Illinois }
County of Cook } ss.

IN THE SUPERIOR COURT OF COOK COUNTY.

In Chancery.

Clara R. Smith
vs.
Continental Illinois Bank and Trust Company, as Successor Trustee, *et al.* } No. 547563.

BILL TO CANCEL VOLUNTARY SETTLEMENT IN TRUST AND FOR ACCOUNTING, ETC.

To the Honorable Judges of the Superior Court of Cook County, in Chancery Sitting:

Your oratrix, Clara R. Smith, of the City of Highland Park, County of Lake, and State of Illinois, brings this her bill of complaint in her own proper person, and humbly complaining unto your Honors showeth:

(1) That your oratrix is now a woman of seventy-six years of age; that in her early years she married Albert Paul Smith of the City of Chicago, and lived with her said husband in said City until his death in the year 1890; that
99 shortly thereafter she removed to said City of Highland Park with her three children born of said marriage, to-wit, Edward, Lora, and Bessie, where she has ever since maintained her home without remarrying.

(2) That her said son, Edward, was in the year 1912 married to Virginia Winslow, and that Edward died on December 16, 1928, leaving said Virginia Winslow Smith, his widow, and leaving no child or children or descendant of any child or children surviving him.

(3) That said daughter Lora became intermarried with one Kennett Cowan, from whom she has since been divorced, and is now known as Lora Smith Cowan; that of said marriage two children were born and are now living, to wit, Kennett Cowan, Jr., and Lora Louise Cowan, who has inter-

married with one Alfred Ruehrdanz, Jr. and is now known as Lora Louise Ruehrdanz; that of her said marriage no children have been born; that said Kennett Cowan, Jr. has intermarried with one Elwyn Hewett, now known as Elwyn Hewett Cowan, and that of said marriage one child, Paul Charles Cowan, has been born, who is now a minor.

(4) That your oratrix's said daughter Bessie has intermarried with Sellar Bullard, and is now known as Bessie Smith Bullard; that of said marriage three children have been born and are now living, to wit, Caroline Marie Bullard, born January 7, 1912, Barbara Sellar Bullard, born January 24, 1913, and Clara Jean Bullard, born October 2, 1917.

100 (5) Your oratrix further shows unto your Honors that as devisee of her said husband and otherwise, your oratrix has for many years last past been possessed of considerable estate and property, the great bulk of which consisted of stocks and bonds and mortgages on real estate; that during the years preceding 1927, out of love and affection for her said three children, she made divers outright gifts to them of sums of money or securities; that in the making of said gifts it was the purpose and endeavor of your oratrix to benefit each of her said children equally and without preference or favoritism, and that in the accomplishment of said gifts, your oratrix, prior to March 3, 1927, distributed approximately One Hundred Seventy-five Thousand Dollars ($175,000.00) to each of her said three children; that on said date, principally at the suggestion and solicitation of her son, Edward, who for many years had been her able and trusted financial and business adviser and manager, your oratrix made and entered into a certain trust agreement in words and figures as follows, to wit:

101 This Agreement, Made this 3rd day of March, A. D. 1927, between Clara R. Smith of the City of Highland Park, County of Lake and State of Illinois (hereinafter for convenience referred to as "Depositor"), and Edward A. Smith, son of Depositor, also of the City of Highland Park, County of Lake and State of Illinois (hereinafter for convenience referred to as "Trustee") Witnesseth:

First: That the Depositor for and in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations to her in hand paid by the Trustee, the receipt whereof is hereby acknowledged, does hereby and by these presents, grant, bargain, sell, convey, assign, set over, re-

lease, quit-claim and deliver unto the Trustee all and singular, the property whether the same be real, personal or mixed, in and to:

130 shares of International Harvester Company Common Stock,

75 shares of National Biscuit Company Preferred Stock,

100 shares of Great Northern Railway Company Preferred Stock,

1824 shares of American Can Company Preferred Stock,

700 shares of Union Pacific Railroad Company Common Stock,

200 shares of American Multigraph Company Stock,

100 shares of Firestone Tire and Rubber Company Common Stock,

To have and to hold the same unto the said Trustee for the following uses and purposes, namely:

The Trustee shall take possession of all of said property, whether real, personal or mixed, and hold, manage, care for, control, invest, and re-invest said trust estate in the name of the Trustee in any real, personal or mixed property, which to the Trustee shall seem advisable, including bonds, stocks, mortgages, notes, securities, real estate and/or any other property, whether real, personal or mixed, which to the Trustee may seem best, with power to vary the investment or investments of said trust estate for any other or others of the character above specified in the discretion of said Trustee, and said Trustee is further authorized and empowered to manage, care for, improve, protect, insure, control, deal with and dispose of said trust estate or any part thereof in his discretion, in any and every way in which an owner thereof could manage, care for, improve, protect, insure, control, deal with and dispose of the same. The Trustee shall have full power as to any real estate which may be held by him to lease or demise the same from time to time, or any part or parts thereof with the improvements thereon or to be erected thereon, for any period or periods not exceeding, however, the period of 198 years; and the said Trustee shall have full power to contract to sell, to sell on any terms, to convey with or without consideration, to mortgage, pledge or otherwise encumber such trust property with the improvements thereon or to be erected thereon; to partition or to exchange said premises, or any part or parts thereof, for other real or
102 personal property, incumbered or unincumbered, and to re-partition or re-exchange such property, or any part

r parts thereof as often as desired, and to sell, contract to ell, lease, by leases to commence in praesenti or in futuro, nd sublease, assign, mortgage, pledge, dispose of, convert nd reconvert, and in general to deal with such property, or ny part or parts thereof, whenever and howsoever, and as ften as desired, to grant easements or charges of any kind, o make contracts or agreements for party walls or in rela- ion thereto or for building or building restrictions or in re- ation thereto or otherwise, to release, convey or assign any ight, title or interest in or about said premises or any part r parts thereof, to give consent on behalf of said premises, r any part or parts thereof, to any use of the streets, al- eys, parks, or public places, for railroads, street railroads, as or electric light poles, lines, pipes, conduits or other equip- nent or other public, or semi-public improvement or use, to erect, repair, remodel and reconstruct building, improve- nents, etc., upon said premises, or any part or parts thereof, o construct sidewalks and to grade, fill, curb and pave streets, nd alleys, to lay and maintain sewer, water and gas pipes, tc., and do all other work and make all other improvements n streets and alleys as said Trustee may desire, all by pri- ate contract, and also to petition any properly constituted nunicipal corporation for the construction of any sidewalk, or for any street or other public or semi-public improvement or use. Said Trustee shall also have full right and power to grant any and all rights and to lease, sublease, sell, assign and otherwise dispose of any right, title or interest concerning or in relation to sub-sidewalk spaces or concerning or in relation to any part of the streets and alleys adjacent to their trust property, and to deal with said premises and every part there- of in all other ways and for such other considerations as it would be lawful for any person owning the same to deal with the same, whether similar to or different from the ways above specified at any time or times hereafter. All of the foregoing recitals of the powers of the Trustee are inclusive and not restrictive.

Said Trustee shall have no responsibility as to the va- lidity or value of, nor shall he be liable for any loss arising from any investments made with the written approval of the Depositor or in accordance with the provisions hereof. Neither shall said Trustee or his successor or successors be personally liable in any matter or in general hereunder unless they shall be guilty of malfeasance or willful negligence in the premises herein,

Second: The Depositor may from time to time in her discretion add to said trust estate, and include therein, any additional property, real, personal or mixed, such additional property to be described in a schedule or schedules and attached hereto, entitled "Schedule of property of the Clara R. Smith Trust," which said schedule or schedules shall
103 bear the signature of the Depositor.

The Schedule or schedules so attached to this agreement, and the property therein described, shall be made a part hereof with the same force and effect as if such property were described in detail herein, and included as a part of the property set forth under property described in paragraph "First" and shall be held by said Trustee in Trust, under the same terms and conditions as though such addition or additions to said trust property were deposited by the Depositor as part of the original deposit made hereunder.

Third: Out of the income derived from the property belonging to said trust estate (whether such income be from rents, interest or otherwise), said Trustee shall first pay all the necessary costs and expenses of the Trustee and of this trust. He shall also make all payments of principal, interest or other sums falling due on any personal property or real estate owned or purchased by said trust estate at any time, or in which the trust estate is interested, and shall pay any other sums which the Trustee may deem necessary for the best interests of said trust estate. Said Trustee shall from time to time set aside from such income such sum or sums as he may deem advisable for the purpose of paying in full or in part any mortgage on said trust estate, or of any part thereof and for the purpose of establishing a reserve for depreciation of buildings which may form a part of said trust estate at any time. Pending the applicatiton of the funds, so reserved, to the payment or reduction of a mortgage or mortgages of, or to the restoration or rebuilding of buildings on real estate forming a part of the trust estate, such funds may be invested and reinvested in like manner as other funds of the trust estate and the income arising therefrom shall be subject to all of the provisions hereof with reference to income from said trust estate. The principal of such reserve funds shall be applied from time to time by said trustee to the payment or reduction of mortgages of real estate or to the payment or reduction of mortgages of leasehold interests in real estate forming a part of the trust estate or to the restoration or rebuilding of buildings thereon or erected

thereon. In case any part of such reserve funds remains unexpended at the termination of this trust it shall be distributed in the same manner as if it were a part of the corpus of the trust estate. Said Trustee shall also have the right to set aside from time to time such an amount or amounts as he may deem necessary for the proper handling and protection of the Trust Estate, and the balance of the income which shall hereafter be designated as "net income" shall during the life time of the Depositor be paid to her as the same is received by said Trustee.

Fourth: In the event that the income derived from this trust and herein provided to be paid to the depositor should be insufficient at any time to maintain the depositor in
104 the manner in which she is accustomed to live at the time of the execution of this agreement, then the Trustee shall have full right and power to pay to the said Depositor from time to time, as he shall see fit such part of the principal of this trust estate as may in his opinion be necessary to so maintain her as she was accustomed to live at the time of the execution of this agreement. Said Trustee shall also have the right to and with the consent of the Depositor to make partial distribution of principal from time to time to either or any of the Depositor's children or others named as beneficiaries hereunder in such amounts as the Depositor and said Trustee may see fit.

Fifth: Upon the death of the Depositor or as soon thereafter as is practicable, said Trustee shall first set aside in property or securities the sum of Three Hundred Thousand ($300,000.00) Dollars which sum shall be divided into three equal parts, and thereafter said Trustee shall hold such shares in three separate and distinct trusts; one of said shares for Depositor's daughter, Lora Smith Cowan, as hereinafter provided; one of said shares for Depositor's daughter, Bessie Smith Bullard, as hereinafter provided; and one of said shares for Depositor's son, Edward A. Smith, as hereinafter provided, administering the said three trusts and disposing of the three respective trust estates in severalty, separate and distinct from each other in manner following, to-wit:

Said Trustee shall pay the net income from each of said shares to the respective child for whom said trust is set aside for and during the lifetime of such child. Such income to be paid to such child either monthly, quarterly, or semi-annually as said Trustee may elect and as shall be for the best interests

of this trust (the wish of the Depositor but not her direction being that such income be paid quarterly).

Upon the death of Depositor's daughter, Lora Smith Cowan, then the income from said sum so set aside for her shall be paid to her children share and share alike until the youngest of her present children attains the age of twenty-six years, or if deceased, then when such child if living would have arrived at said age at which time the principal of said trust estate shall be divided among the children of Depositor's said daughter share and share alike. It being the intention that in the event that all of the children of Depositor's said daughter have arrived at the age of twenty-six years prior to her decease that then distribution of said principal shall be made immediately after her decease. In the event of the death of any of her said children prior to the time of the distribution of the said principal sum hereunder, then the income shall be paid to the heirs-at-law of such deceased child or children according to the present laws of descent of
105 the State of Illinois until time for the final distribution of said sum whereupon said principal sum shall likewise be paid to said heirs-at-law of such deceased child or children.

Upon the death of Depositor's daughter, Bessie Smith Bullard, then the income from said sum so set aside for her shall be paid to her children share and share alike until the youngest of her present children attains the age of twenty-six years, or if deceased, then when such child if living would have arrived at said age at which time the principal of said trust estate shall be divided among the children of Depositor's said daughter share and share alike. It being the intention that in the event all of the children of Depositor's said daughter have arrived at the age of twenty-six years prior to her decease that then distribution of said principal shall be made immediately after her decease. In the event of the death of any of her said children prior to the time of the distribution of the said principal sum hereunder, then the income shall be paid to the heirs-at-law of such deceased child or children according to the present laws of descent of the State of Illinois, until time for the final distribution of said sum whereupon said principal sum shall likewise be paid to said heirs-at-law of such deceased child or children.

Upon the death of Depositor's son, Edward A. Smith, then the income from said sum so set aside for him shall be paid to his widow for and during her natural life unless he shall

leave him a child or children surviving in which event said income shall be paid to such child or children until said youngest child arrives at the age of twenty years at which time the principal of said trust estate shall be divided among the children of Depositor's said son share and share alike. It being the intention that in the event that all of the children of Depositor's said son have arrived at the age of twenty years prior to his decease, that then distribution of said principal shall be made immediately after his decease. In the event of the death of any of his said children prior to the time of the distribution of the said principal sum hereunder, then the income shall be paid to the heirs-at-law of such deceased child or children according to the present laws of descent of the State of Illinois until time for the final distribution of said sum whereupon said principal sum shall likewise be paid to such heirs-at-law of such deceased child or children. In the event Depositor's said son shall leave him no child or children surviving, then the principal of said trust estate shall upon the death of both himself and his widow be paid one-half to the children of Depositor's daughter, Lora Smith Cowan, and one-half to the children of Depositor's daughter, Bessie Smith Bullard, the heirs-at-law of any deceased child to receive the part such deceased child would have received if living.

106 The remainder of said principal after the setting aside of said Three Hundred Thousand ($300,000.00) Dollars shall, upon the said death of the Depositor be divided into three equal parts as nearly as is practicable or possible, quality and quantity considered, so that when said division is completed, each of said three shares shall be as nearly as is practicable of the same fair cash market value deducting, however, any payment on account of principal theretofore made (if any) to any of Depositor's child or children from such child or children's share, one of said parts shall be paid to each of said children of the Depositor, if living, and in the event of the death of any of said children prior thereto, then the share which such deceased child would have received, if living, shall be added to the principal of and become a part of the One Hundred Thousand ($100,000.00) Dollar trust herein created for such child so deceased.

Sixth: The Trustee reserves unto himself, the right to resign from this trust at any time upon giving five days' written notice of said resignation to the beneficiaries hereunder. In case of said resignation or in case of the death or other

inability to act at any time of the said Trustee, then the Illinois Merchants Trust Company with its principal office in the City of Chicago and State of Illinois, shall act in his place and stead, and in the event of the resignation, removal, failure or refusal or inability of the said Illinois Merchants Trust Company to act, then a new Trustee shall be appointed in its place and stead, which said new trustee shall be appointed by a Court in Chancery in Cook County, Illinois, after notice to all parties in interest as is now provided for serving notice in chancery.

Seventh: For the purpose of making distribution, the Trustee or his successor is authorized and empowered to value and appraise any and all of said trust estate and to distribute the same in kind or in cash, as he, or it, may deem advisable, and any such valuation or appraisement, so made shall be valid and binding upon each and every beneficiary hereunder.

Eighth: All estate, inheritance and other taxes, and all deeds of transfer, charges, and acceptances, if any, which may be levied or incurred in and in connection with any payments or gifts under this agreement, shall be paid by the Trustee out of the corpus or unexpended net income of the trust estate subject to this agreement.

Ninth: In the event the Trustee shall be made a party to any litigation on account of the trust or the trust estate hereby created, such Trustee shall have a lien on such trust estate for all costs and expenses, including reasonable compensation and reasonable attorney's fees, and shall be reimbursed from said trust estate therefor.

107 Tenth: Any present or future Trustee, or beneficiary may contract with the Trustee on the same basis as any other person.

Eleventh: No purchaser at any sale made by the Trustee under this indenture, shall be obliged to see to the application of the purchase money.

Twelfth: No part of the trust estate shall become vested until such time as the beneficiary or beneficiaries hereunder shall become entitled to the actual possession thereof; payment of income and principal provided for herein shall be made to the respective beneficiaries in person (except payments made to or for the benefit of minors) and then only upon their respective receipts and shall not be grantable, transferable, or otherwise assignable in whole or in part by the voluntary or involuntary acts of the respective benefici-

aries or by operation of law and shall not be liable for any obligation of the respective beneficiaries.

In Witness Whereof, the Depositor has hereunto set her hand and seal, and the Trustee has likewise hereunto set his hand and seal, all the day and year first above written.

Clara R. Smith (Seal)
Depositor.
Edward A. Smith (Seal)
Trustee.

108 State of Illinois, }
County of Lake. } ss.

I, Raymond L. Erskine, a Notary Public in and for said County in the state aforesaid, Do Hereby Certify, That Clara R. Smith personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed and delivered the said instrument as her free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this 3rd day of March, A. D. 1927.

Raymond L. Erskine,
Notary Public.

109 That immediately after the execution of said trust agreement and pursuant thereto, the securities described therein were transferred and delivered by your oratrix to her said son as Trustee, and thereafter until his death remained in his name as such Trustee and in his possession; that said securities had on the date of the execution of said trust agreement a market value of, to wit: $400,000.00, and that the total value of said trust estate is now approximately $350,000.00.

(6) That after the execution of said trust agreement, said Edward A. Smith continued to act as trustee thereunder until the time of his death, to wit, December 16, 1928; that the Illinois Merchants Trust Company, named as successor trustee under said trust instrument became, subsequent to the date thereof, merged or consolidated with a certain other corporation or corporations having trust powers, and that the corporation resulting from such merger or consolidation is known as Continental Illinois Bank & Trust Company, and has succeeded to all rights, privileges, powers, and trusts resident

in said Illinois Merchants Trust Company, including said right as successor trustee under said trust instrument, and that said Continental Illinois Bank & Trust Company has accepted said trust and is now and for some time past has been acting as trustee under the aforesaid trust agreement.

(7) That your oratrix recently has been advised by counsel, and so alleges the fact to be, that certain of the provisions of said trust instrument designed to control and effect the disposition of income and principal of the portion of said trust fund set aside for your oratrix's son, Edward A. Smith, to wit, One Hundred Thousand Dollars ($100,000.00) plus such further sum as might come to said share by reason of Edward A. Smith's predeceasing your oratrix, are invalid, inoperative, void, and ineffective because violative of the Rule against Perpetuities; that the said void and inoperative provisions of said trust instrument are as follows:

"Upon the death of Depositor's son, Edward A. Smith, then the income from said sum so set aside for him shall be paid to his widow for and during her natural life unless he shall leave him a child or children surviving in which event said income shall be paid to such child or children until said youngest child arrives, at the age of twenty years at which time the principal of said trust estate shall be divided among the children of Depositor's said son share and share alike. It being the intention that in the event that all of the children of Depositor's said son have arrived at the age of twenty years prior to his decease, that then distribution of said principal shall be made immediately after his decease. In the event of the death of any of his said children prior to the time of the distribution of the said principal sum hereunder, then the income shall be paid to the heirs-at-law of such deceased child or children according to the present laws of descent of the State of Illinois until time for the final distribution of said sum whereupon said principal sum shall likewise be paid to such heirs-at-law of such deceased child or children. In the event Depositor's said son shall leave him no child or children surviving, then the principal of said trust estate shall upon the death of both himself and his widow be paid one-half to the children of Depositor's daughter, Lora Smith Cowan, and one-half to the children of Depositor's daughter, Bessie Smith Bullard, the heirs-at-law of any deceased child to receive the part such deceased child would have received if living."

and that by virtue of the provisions contained in the para-

nmediately following said void and inoperative pro-
of said trust instrument, the said Edward A. Smith
ing predeceased your oratrix, one-third of the value
xcess of Three Hundred Thousand Dollars ($300,-
00) of said whole trust fund at the time of your ora-
eath would be and is likewise affected by said void
perative provisions, so that said trust instrument
ails to effect any valid disposition of a full one-third
hole amount of said trust fund.

That your oratrix is advised by her said counsel, and
es the fact to be, and said provisions last above quoted
disposition of the share of Edward A. Smith under
st violate said Rule against Perpetuities in this, that
us of said share is so limited as to remain contingent
ested until after the expiration of the life of said Ed-
. Smith and the expiration of the life of any person
e might leave surviving him as his widow; that it was
that said Edward A. Smith might survive your ora-
marry a woman not in being at the time of the execu-
said trust instrument or at the time of the death of
atrix, and who might survive him and all other per-
med in said instrument for a period of more than
one years, and consequently that said corpus might
in any person for a longer period than a life or lives
and twenty-one years, as said Rule requires.

Your oratrix further alleges and shows unto your
that had she know or been advised that said trust in-
t, by reason of said violation of said Rule against
ities, was wholly inoperative and ineffective as to
-third of said trust fund, she would not have signed
delivered the same; that your oratrix conceived and
ended the disposition of the whole of said trust fund
single and connected distributive scheme, and would
e created said trust or have provided for the payment
r income or principal of any part of said fund to any
eneficiary named in said instrument if she had known
advised that the provisions therein for distribution
hildren of her son Edward surviving him were void, or
further provisions for the distribution of the shares
d for such children, effective in the event he should
o child surviving him, were void.

Your oratrix further shows unto your Honors that
sons hereinbefore named, and who are hereinafter
as defendants to this your oratrix's bill of complaint,

are the only persons now in being who by any contingency or possibility whatever now have or hereafter may claim any right, title, or interest, beneficial or otherwise, in or to the trust fund established and held under said trust agreement aforesaid, and that the persons so named as defendants represent in equity all and singular persons who may hereafter be born and who might under any contingency become entitled to any estate, right, title or interest in or to said trust fund.

Forasmuch, Therefore, as your oratrix is without remedy in the premises except in a court of equity where such matters are properly cognizable and relievable, and to the end that said Continental Illinois Bank & Trust Company, as successor trustee, Virginia Winslow Smith, Lora Smith Cowan,
113 Kennett Cowan, Jr., Elwyn Hewett Cowan, Paul Charles Cowan, a minor, Lora Louise Ruehrdanz, Alfred Ruehrdanz, Jr., Bessie Smith Bullard, Sellar Bullard, Caroline Marie Bullard, Barbara Sellar Bullard, and Clara Jean Bullard, a minor, who are hereby made parties defendant to this bill of complaint, may be required to make full and direct answer to the same, but not under oath, the answers of said defendants under oath being hereby expressly waived; that a guardian ad litem may be appointed for said minor defendants, Paul Charles Cowan and Clara Jean Bullard, to defend the interests of said minor defendants in this suit, and that by the final decree of this court entered herein it may be found, ordered, adjudged, and decreed that the parties to this cause represent in equity all the persons now in being or who may hereafter be born who are or may hereafter under any contingency become entitled to any estate, right, title, or interest in or to the trust fund held under the trust agreement hereinbefore described, and that such decree will bind and conclude all and singular such person and persons and their respective estates and interests claimed by, through, or under said trust agreement; that this Honorable Court will construe and interpret the terms and provisions of said trust agreement, and will ascertain, find, and declare particularly that the provisions thereof, which are last hereinabove set forth, providing for the distribution of corpus of the share set apart under said instrument for Edward A. Smith to his children surviving him, and providing further for the gift over of said corpus in the event said Edward A. Smith should leave no children surviving him,

are void, inoperative, and ineffective because in violation
114 of the Rule against Perpetuities, and will by its said final decree adjudge and declare that the dispositive provisions of said trust instrument present and were intended by your oratrix as a single, connected, and inseparable scheme, and that by reason of the ineffectiveness of said provisions disposing of the corpus of said share so set aside for said Edward A. Smith, the whole of said scheme and trust arrangement is destroyed and rendered void, and that the court may in and by its said final decree adjudge and declare the said trust to be ended and terminated in toto, and may order, decree, and direct the said defendant, Continental Illinois Bank & Trust Company, trustee, to account for and assign, transfer, and set over to your oratrix all of the assets and property held by said defendant in said trust, and that your oratrix shall thereupon hold and possess the same as her own absolute property, free and clear of any trust declared in said trust agreement, and free and clear of any right, claim, or demand of the defendants or any person claiming by, through, or under the provisions of said trust agreement; and will grant unto your oratrix such other and further relief in the premises as the nature of her case may require and as to this Court may seem agreeable to equity and good conscience.

May It Please Your Honors to grant unto your oratrix the People's Writ in chancery issued out of and under the seal of this Honorable Court, directed to the Sheriff of Cook County aforesaid, commanding him that he summon all and singular the defendants hereinbefore named to be and
115 appear before this Honorable Court on the first day of the December A. D. 1931 Term thereof, then and there to answer all and singular the premises, but not under oath, as herein provided, and to stand to, abide by, and perform such orders and decrees as may be entered herein.

And your oratrix will ever pray, etc.

(S) Clara R. Smith,
Complainant.

(S) McNott, Holmes & Long,
Solicitors for Complainant.

116 State of Illinois } ss
County of Cook }

Samuel S. Holmes, being first duly sworn, deposes and says that he is one of the solicitors for Clara R. Smith, complainant in the foregoing Bill; that he has read the foregoing Bill by her subscribed and knows the contents thereof, and that the same is true as therein stated to the knowledge of this affiant.

(S) Samuel S. Holmes.

Subscribed and Sworn to before me this 25 day of November, 1931.

(S) Mary E. Riley,
Notary Public.

(Seal)

117 PETITIONERS EXHIBIT NO. 4.

Filed at Hearing Feb.-13-1935.

An Indenture, made this 17th day of February, A. D. 1932, by and between Clara R. Smith of Highland Park, Lake County, Illinois, party of the first part (hereinafter for convenience referred to as the "Trustor"), and Continental Illinois Bank and Trust Company, an Illinois corporation, authorized to execute trusts, having its office in Chicago, Cook County, Illinois, party of the second part (hereinafter for convenience referred to as the "Trustee"):

Whereas, the Trustor desires to create a trust of the property described and set forth in the schedule hereto attached, marked "Schedule A", to be held upon the terms and conditions and upon the trusts hereinafter set forth and declared, and desires the Trustee to act as trustee hereunder, and the Trustee is willing to receive and hold such property upon such trusts:

Now, Therefore, This Indenture Witnesseth:

That the Trustor, in consideration of the sum of One Dollar ($1.00) to her in hand paid by the Trustee, the receipt of which is hereby acknowledged, has sold, assigned, transferred, conveyed, and delivered, and by these presents does sell, assign, transfer, convey, and deliver the securities and property described in Schedule A hereto attached and made a part hereof as though set forth at length herein, to the Trus-

tee, to be taken and held upon the following conditions and trusts:

First: (a) During the lifetime of the Trustor, but only after the death of Virginia Winslow Smith, the
118 Trustor may, at any time and from time to time by a further or supplemental instrument by her signed and acknowledged and delivered to the Trustee, (1) alter, change, or amend this agreement and the terms of the trust hereby created; (2) change the beneficiaries under this trust; (3) withdraw and receive all or any portion of the corpus of the trust estate; (4) wholly or partially revoke and annul the provisions hereof, Provided that the duties and responsibilities or the compensation of the Trustee shall not be changed or fixed without the consent of the Trustee; and (5) remove the Trustee and appoint a successor.

Second: The Trustee shall have the following rights and powers with respect to the trust estate:

(a) To invest and reinvest the trust estate; to collect the income, rents, issues, profits, and increase therefrom, and to sell upon any terms, give options to purchase, assign, lease, contract to lease, exchange, encumber, and pledge and mortgage, and to alter and change the investments thereof from time to time in its discretion; to improve, manage, protect, subdivide, and partition any real estate forming a part of the trust estate; to dedicate to public use and vacate any part thereof; to contract to sell, grant options to purchase, sell upon any terms, and convey, mortgage, or encumber; grant options to lease, and to lease for any term (including leases for ninety-nine years or a longer or shorter period of time) although such term extends beyond the period of the trust hereby created, and make leases upon such terms and conditions as may be deemed proper; to renew, exchange, and/or extend leases and consent to the assignment and modification of any lease;

(b) To retain as investments of the trust estate,
119 without liability or responsibility for loss or depreciation in value, by reason of the fact that said securities and/or property may not be of the character permitted for investment by trustees under the laws of the State of Illinois, any securities and/or property that may be conveyed or transferred to it to be held under the trust hereby created.

(c) To invest and reinvest the trust estate in bonds of the United States of America, or of any state, municipality, or subdivision thereof, or in like securities of any country

other than the United States of America; or in first mortgages and first mortgage bonds on or secured by income-producing real estate located in any state; or in bonds, notes, debentures, mortgages, or stocks of any corporation within or without the United States of America (the term "stock" to include voting trust certificates and shares of all classes of stock of any corporation if there be more than one); or in certificates of beneficial interest or participation in or promise to pay issued against or secured in whole or in part by groups of securities similar to or embracing those hereinabove specified; or in real or other property; although any of the investments herein set forth are not of the character permitted for investments by trustees under the laws of the State of Illinois now in force or at any time during the continuance of the trust in force;

(d) In its discretion, to unite with other owners of property or securities similar to any which may be held at any time in this trust in carrying out any plan for the reorganization of any corporation or company whose securities may form a portion of the trust estate at any time; to exchange
securities of any corporation or company for others is-
120 sued by the same or any other corporation or company upon such terms as the Trustee shall deem proper; to consent to the consolidation or merger of any corporation or company with any other corporation or company, to the lease or sale by any corporation or company of its property or any portion thereof to any other corporation or company, or to the lease or sale by any other corporation or company of its property or a portion thereof to such corporation, and upon any consolidation, merger, lease, sale, or similar arrangement, to exchange the securities held for other securities issued in connection with such arrangement; and to pay all assessments, expenses, and sums of money which it may deem expedient or which may be required for the protection of the interests of the trust estate;

(e) All interest accrued on bonds or like securities at the time of transfer or delivery to the Trustee and all cash dividends declared prior to and payable after the delivery of any stocks to the Trustee shall be considered as income and not as principal.

Excepting as hereinbefore provided, the Trustee shall have power in its uncontrolled discretion to determine whether any part of the trust estate or any addition or increment thereto be income or principal, or whether any cost, charge, expense,

tax, or assessment shall be charged against income or principal, or partly against income and partly against principal. Any and all determinations and decisions by the Trustee under this paragraph shall be conclusive for all purposes and upon all persons.

(f) The trust estate shall be liable for inheritance and estate taxes, if any, levied upon or in respect of the trust estate for the distributive shares thereof, and the Trus-
121 tee is hereby authorized to reimburse the executor or other representative of the Trustor's estate for any such taxes paid by such executor or other representative in respect of the trust estate hereunder.

(g) In general, the Trustee is given as full and complete power and authority over the trust estate and property and each and every part thereof as fully and to the same extent as any individual might, could, or would have owning similar properties and securities in his own right.

(h) No person dealing with the Trustee or the trust estate shall be bound to see to the application of any purchase money or other consideration, or any money borrowed under mortgage or pledge, or to inquire into the power and/or the authority of the Trustee or into the validity, expediency, or propriety of any sale, option, assignment, transfer, exchange, conveyance, mortgage, or pledge of the trust estate.

(i) The Trustee shall have full power and authority by contract to bind the trust estate without making itself individually liable, and to perform any and all other acts which it may deem proper for carrying out the purposes of this agreement.

(j) The Trustee may employ such agents, brokers, attorneys, and assistants as it may deem necessary or proper in the matter of the execution of the trusts herein. It shall in no event be liable for any neglect, omission, misconduct, mistake, act, or default of any agent, broker, attorney, or assistant selected or retained with reasonable care.

(k) The Trustee shall be paid a reasonable compensation for its services.

(l) All costs, charges, and expenses of the trust estate and of the management thereof, including compensa-
122 tion of the Trustee and that of agents, brokers, attorneys, and assistants that it may employ, and all taxes, assessments, and charges thereon, shall be repaid and allowed to the Trustees from the trust fund, but shall be payable out of the income and not from the principal.

(m) The Trustee, in its discretion, may cause any securities or property at any time held by it hereunder to be carried in its individual name or in the name of a nominee without disclosing the fact that such property is part of the trust estate and without liability for conversion of any property so carried without disclosing the fact of the trust.

(n) In making distribution of the principal or corpus of the trust estate or of any part thereof, the Trustee, in its uncontrolled discretion, may make distribution to all or any of the beneficiaries hereunder in money and/or property of the trust estate. In making distribution in property, the Trustee shall not be required to distribute to any beneficiary an aliquot part of any security or property comprising the trust estate at the time of distribution, and the judgment of the Trustee as to what shall constitute a proper division among them and its selection and valuation shall be binding and conclusive upon all beneficiaries hereunder.

(σ) In making any distribution and in taking any action whatsoever hereunder, the Trustee may rely and shall be fully protected in relying upon any notice, certificate, affidavit or other paper or document believed by it to be genuine, or upon any evidence deemed by it to be sufficient. The Trustee shall be protected and saved harmless in all payments required to be made hereunder, made in good faith and without actual notice or knowledge of the changed condition or status of any person receiving payments upon a condition.

123 (p) The decision of the Trustee as to any discretions conferred upon it under the terms of this agreement shall be final and conclusive upon all concerned.

Third: No money or property (either principal or income) payable or distributable under the provisions of this instrument shall be pledged, assigned, transferred, sold, or in any manner whatsoever anticipated, charged, or encumbered by any of the beneficiaries hereunder, or be in any manner liable in the possession of the Trustee for the debts, contracts, obligations, or engagements of such beneficiaries, voluntary or involuntary, or for any claims, legal or equitable, against any beneficiary, including claims for alimony or for the support of any spouse. All payments to any beneficiary, whether by check or otherwise, shall be made only to and upon the personal receipt of such beneficiary.

Fourth: In the event that the Continental Illinois Bank and Trust Company at any time shall merge or consolidate with or shall sell or transfer substantially all its assets and busi-

ness to another corporation, the corporation resulting from such merger or consolidation of the corporation to which such sale or transfer shall be made (whether organized under the laws of the State of Illinois or of the United States of America) shall thereupon become and be the Trustee hereunder without the execution of any instrument and without further action on the part of any person in interest under the terms of this agreement, and shall have all the powers and be subject to all the duties herein imposed upon or assumed by Continental Illinois Bank and Trust Company as Trustee under the terms of this agreement.

124 **Fifth:** The powers and duties of the Trustee hereunder and all questions of interpretation of this instrument shall be governed by the law of the State of Illinois.

Sixth: The income from the trust estate and the principal thereof shall be distributed as provided in Schedule B hereto attached, signed for further identification by the Trustor and by an officer of the Trustee, and made a part hereof as though at length fully set forth herein.

In Witness Whereof, the Trustor has hereunto signed her name and affixed her seal, and the Trustee has caused its name to be hereunto signed by its proper officers and its corporate seal to be affixed hereunto, all on the day and year first above written.

(s) Clara R. Smith (Seal)
Continental Illinois Bank and Trust Company,
By (s) J. E. Blunt,
Vice-President.

Attest:
Signature illegible
Assistant Secretary.

125 State of California }
County of Santa Barbara } ss.

I, (s) Emily H. Hayward, a Notary Public in and for said County, in the State aforesaid, Do Hereby Certify that Clara R. Smith, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed, and delivered the said instrument as her free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and Notarial Seal this 17th day of February, 1932.

(s) Emily H. Hayward,
Notary Public.

State of Illinois }
County of Cook } ss.

I, (s) Fred B. Stocker, a Notary Public in and for said County, in the State aforesaid, Do Hereby Certify that illegible and signature illegible, personally known to be to be a Vice-President and an Assistant Secretary, respectively, of Continental Illinois Bank and Trust Company, and known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act, and as the free and voluntary act and deed of said Bank, for the uses and purposes therein set forth and the said illegible, Assistant Secretary of said Bank, did then and there acknowledge and declare that he had affixed thereto the corporate seal of said Bank, pursuant to the authority granted to him by the By-Laws of said Bank.

Given under my hand and Notarial Seal this ..... day of ....., 1932.

.....
Notary Public.

126 SCHEDULE "A"

Being a List of Securities Deposited in Accordance with Trust Agreement
between
Clara R. Smith, as Trustor
and
Continental Illinois Bank and Trust Company as Trustee
Dated February ....., 1932.

594 shares	American Can Co. Pfd.
92 shares	Addressograph-Multigraph Com.
162 shares	Firestone Tire & Rubber Com.
33 shares	Great Northern Pfd.
180 shares	International Harvester Com.
25 shares	National Biscuit Pfd.
227 shares	Union Pacific Com.

127 SCHEDULE "B"

Being the Schedule Referred to in Article Sixth
of a Trust Agreement
between
Clara R. Smith, as Trustor
and
Continental Illinois Bank and Trust Company, as Trustee
Dated February 17th, 1932
Providing for the Distribution of Principal and Income
of the Trust Estate.

The said Trustee shall pay all the net income arising from said trust estate to the Trustor, Clara R. Smith, for and during her natural life. Upon the death of said Trustor, Clara R. Smith, said Trustee shall pay the entire net income thereafter arising from said trust estate to Virginia Winslow Smith (daughter-in-law of said Trustor) for and during her natural life. Upon the death of both said Clara R. Smith and Virginia Winslow Smith said Trustee shall pay over and distribute all the principal of said trust estate, together with any accumulated and undistributed income thereon, to Lora Smith Cowan and Bessie Smith Ballard, (daughters of said Trustor) in equal parts, share and share alike. The income provided hereunder to be paid to the above named beneficiaries shall be paid in monthly installments.

(s) Clara R. Smith (Seal)
Continental Illinois Bank and Trust Company,
By (signature illegible)
Assistant Secretary.

128 EXHIBIT 5.

Filed at Hearing Feb. 13-1935.

LAST WILL AND TESTAMENT.

I, Clara R. Smith, of the City of Highland Park, County of Lake, and State of Illinois, do hereby make, publish, and declare this my Last Will and Testament, in manner and form following:

First: I direct that all my just debts and funeral expenses be paid as soon after my decease as conveniently can be done.

Second: I give and bequeath to my two daughters, Bessie Smith Bullard and Lora Smith Cowan, all my books, pictures, rugs, silverware, bric-a-brac, household furniture and furnishings, automobiles, wearing apparel, jewelry, goods and chattels, the same to be divided equally between them.

Third: A. I give and bequeath to my grandson, Kennett Cowan, Jr., the sum of Fifteen Thousand Dollars ($15,000.00);

B. I give and bequeath to my granddaughter, Lora Cowan Ruehrdanz, the sum of Fifteen Thousand Dollars ($15,000.00);

C. I give and bequeath to my granddaughter, Caroline Marie Bullard, the sum of Twenty-Five Thousand Dollars ($25,000.00);

D. I give and bequeath to my granddaughter, Barbara Sellar Bullard, the sum of Twenty-Five Thousand Dollars ($25,000.00);

E. I give and bequeath to my granddaughter, Clara Jean Bullard, the sum of Twenty-Five Thousand Dollars ($25,000.00);

F. It is my hope that my grandchildren will conserve the principal of the foregoing bequests and spend only the income therefrom.

Fourth: I give and bequeath to my friend, Ina G.
129 Newell, The sum of Five Thousand Dollars ($5,000.00).

Fifth: I give and bequeath to my chauffeur, John Zehren, the sum of Five Thousand Dollars ($5,000.00).

Sixth: I give, devise, and bequeath the sum of One Hundred Thousand Dollars ($100,000.00) to Sellar Bullard, as Trustee, to have and to hold the same upon the trusts and for the uses and purposes hereinafter expressed, that is to say;

A. Said Trustee shall be vested with all the rights, powers, privileges, immunities, discretions, and obligations hereinafter enumerated and set forth in Paragraph Eighth hereof.

B. I direct my Trustee to pay the net income from said trust fund in convenient quarterly installments to Bessie Smith Bullard for and during her natural life. Upon the death of said Bessie Smith Bullard I direct my Trustee to pay one-third (⅓) of the income from said trust fund in convenient quarterly installments to each of my granddaughters, Caroline Marie Bullard, Barbara Sellar Bullard, and Clara Jean Bullard, until each shall respectively attain the age of thirty-five (35) years, and as and when each of said granddaughters shall attain the age of thirty-five (35) years, I direct my Trustee to pay over and distribute to said grandchild an equal one-third (⅓) portion of the principal of said trust estate, together with any accumulated and unpaid interest thereon, and thereupon this trust as to that portion so paid shall cease and terminate. It is my intention that
130 the respective interests of my said grandchildren, Caroline Marie Bullard, Barbara Sellar Bullard, and Clara Jean Bullard, shall vest in interest upon my death, and that in the event of the death of any one of them prior to the time such grandchild arrives at the age of thirty-five (35) years, the share of the one so dying shall be distributed immediately, if said Bessie Smith Bullard shall then be deceased, or if living, then immediately after her death.

Seventh: I give, devise, and bequeath the sum of One Hundred Thousand Dollars ($100,000.00) to Sellar Bullard, as Trustee, to have and to hold the same upon the trusts and for the uses and purposes hereinafter expressed, that is to say:

A. Said Trustee shall be vested with all the rights, powers, privileges, immunities, discretions, and obligations hereinafter enumerated and set forth in Paragraph Eighth hereof.

B. I direct my Trustee to pay the net income from said trust fund in convenient quarterly installments to Lora Smith Cowan for and during her natural life. Upon the death of said Lora Smith Cowan I direct my Trustee to pay one-half (½) of the income from said trust fund in convenient quarterly installments to each of my grandchildren, Kennett Cowan, Jr. and Lora Cowan Ruehrdanz, until each shall attain the age of thirty-five (35) years, and as and when each of said grandchildren shall attain the age of thirty-five (35) years, I

direct my Trustee to pay over and distribute to said
131 grandchild one-half of the principal of said trust estate, together with any accumulated and unpaid interest thereon, and thereupon this trust as to that portion so paid shall cease and terminate. It is my intention that the respective interests of my said grandchildren, Kennett Cowan, Jr. and Lora Cowan Ruehrdanz, shall vest in interest upon my death, and that in the event of the death of either of them prior to the time such grandchild arrives at the age of thirty-five (35) years, the shares of the one so dying shall be distributed immediately, if Lora Smith Cowan shall then be deceased, or if living, then immediately after her death.

Eighth: A. I do hereby authorize and direct my said Trustee, hereinabove named in Paragraphs Sixth and Seventh hereof, to take possession of all the estate, real, personal, and mixed, herein appointed, devised, and bequeathed to him, and to invest and reinvest said trust estate in the name of my said Trustee in such bonds, stocks, notes, real estate mortgages, or other securities, or in such property, whether real, personal, or mixed, as my Trustee in his discretion may determine, without being limited by any statute or rule of law regarding investments by trustees. And I do further authorize and empower my said Trustee to manage, care for, improve, protect, control, deal with, and dispose of my said trust estate or any part thereof in his discretion in any and every way in which I could have managed, cared for, improved, protected, controlled, dealt with, and disposed of the same if living; and I do hereby give and grant unto
132 my said Trustee full power and authority to enter into agreements from time to time as he may deem necessary or expedient with reference to the reorganization of corporations whose stock or bonds or other obligations form a part of this trust estate; to improve, manage, protect, and subdivide any and all real estate which may at any time be a part of my said trust estate to dedicate parks, streets, highways, or alleys, and to vacate any subdivision or part thereof, and to resubdivide said property as often as desired; to contract to sell, to sell said real estate on any terms, at public or private sale or sales for cash or credit or part cash and part credit; to convey either with or without consideration; to donate, to dedicate, to mortgage, pledge, or otherwise encumber; to lease said real estate or any part thereof from time to time by leases to commence in praesenti or in futuro,

and upon any terms and for any period or periods of time, ordinary or extraordinary, and to amend, change, or modify leases and the terms and provisions thereof at any time or times hereafter; to partition and repartition and to exchange and re-exchange said property or any part thereof for other real or personal property; to grant easements or changes of any kind; to release, convey, or assign any right, title, or interest in or about said premises to construct and reconstruct, remodel, alter, repair, add to or take from buildings on said premises, and to deal with said real estate and every part thereof in all other ways and for such other considerations as it would be lawful for any person owning the same to
133 deal with the same, whether similar to or different from the ways above specified, at any time or times hereafter. I further authorize my Trustee from time to time to borhow money and pledge as security for the payment thereof all or any part of the personal estate forming a part of my trust estate.

B. I further authorize my Trustee to cause any security which may at any time constitute a portion of the trust estate to be issued, held, or registered in his own name or in the name of his nominee or in such form that title will pass by delivery.

C. I further authorize my Trustee to determine what is "income" and what is "principal" hereunder, and his decision thereon shall be final provided, however, that; (1) any interest or dividend received by my Trustee on any security held hereunder which is accrued and unpaid at the time of the delivery of such security to my Trustee shall be considered as income; (2) in the case of securities purchased at a discount the entire subsequent sale price or maturity value shall be credited to principal; (3) in the case of securities purchased at a premium my Trustee shall charge the premium immediately against income without amortizing the same; and (4) any stock dividend or subscription right which may be declared upon or issued in connection with any stock constituting a portion of the trust estate shall be considered as principal and not as income.

D. In no case shall any party to whom said trust es-
134 tate or any part thereof is conveyed, contracted to be sold, leased, or mortgaged by said Trustee, and in no case shall any party dealing with said Trustee in relation to said trust estate be obliged to see to the application of any

purchase money, rent, or money borrowed or advanced on said trust estate, or be obliged to inquire into the necessity or expediency of any act of said Trustee.

E. For convenience in the administration and investment of my said estate, I authorize my said Trustee in his discretion to consider and manage all the property of the estate in his hands as one fund without regard for the several interests herein provided for the respective beneficiaries, and a separate book account shall be sufficient to show the interest of the respective beneficiaries.

F. I direct my Trustee to collect the income derived from said trust estate, and from such income my Trustee shall first pay all of the necessary costs and expenses of this trust, including outlays necessary for the protection, management, and upkeep of said trust estate, repairs, taxes (general, special, or income), outlays necessary for the insurance, care, and maintenance of said trust estate, and the reasonable compensation of my Trustee.

G. For convenience in making the distributions or divisions of my said trust estate herein directed and provided, I authorize either my Executor, hereinafter named, or my said Trustee, in his discretion, to convert into money all
135 or any part of my said estate, in whatever form the same shall at any time be invested, and for that purpose I hereby authorize and empower my said Executor and also my said Trustee to sell, convey, and dispose of all or any part of my said estate, real or personal, in his discretion, and to execute and deliver all instruments of conveyance and transfer necessary and/or proper; or said Executor or Trustee is hereby authorized in his discretion to make any such distribution or division of my said trust estate in kind in any of the assets in which my said estate may at any time be invested, and the valuations placed upon the various assets of my estate by my Executor or Trustee for the purpose of making any such distribution or division shall be conclusive upon all the beneficiaries under this, my Will, and my said Executor and my said Trustee shall not be responsible to any beneficiary under this, my Will, for any errors made by my said Executor or my said Trustee in the valuation of any such assets.

Ninth: All the rest, residue, and remainder of my estate, real, personal, and mixed, wheresoever situate, of which I may die seized or possessed or to which I may be entitled at the time of my decease, I give, devise, and bequeath to my

said two daughters, Lora Smith Cowan and Bessie Smith Bullard, in equal parts, share and share alike.

Tenth: Each and every payment by my Trustee, either of income or principal, to any beneficiary in Paragraphs
136 Sixth and Seventh of this, my Last Will and Testament, provided for shall be paid, transferred, delivered, and conveyed to such beneficiary in person or upon his or her personal receipt, and not upon any written or verbal order or upon any assignment or transfer by said beneficiary.

Eleventh: I nominate, constitute, and appoint my son-in-law, Sellar Bullard, executor of this, my Last Will and Testament, and direct that he be not required to give any bond for the faithful discharge of his duties as such executor.

Twelfth: In case of the death, resignation, inability, or refusal to act of Seller Bullard as Executor and/or Trustee hereunder then and thereupon my said two daughters, Lora Smith Cowan and Bessie Smith Bullard, jointly, or the survivor of them, shall be and hereby are made successors as Executors and/or Trustees or successor as Executor and/or Trustee hereunder, and such successors or the survivor of them shall thereupon be vested with all the title, rights, powers, privileges, immunities, duties, discretions, and obligations herein conferred upon and vested in the Executor and/or Trustee first named, with the same force and effect as if such successors or the survivor of them had been made the first Executors or Executor and/or Trustees or Trustee hereunder.

If both the said Bessie Smith Bullard and Lora Smith Cowan accept the trusts herein and act as joint successor Trustees, then in case of the death, resignation, refusal,
137 or inability to act of either the said Lora Smith Cowan or Bessie Smith Bullard as successor Trustees hereunder, the survivor of them or the one remaining shall thereupon act as sole successor Trustee of my said trust estate, and shall thereupon be vested with all the title, rights, powers, privileges, immunity, duties, and obligations herein conferred upon and vested in Sellar Bullard as the Trustee first named, with the same force and effect as if said survivor or the one remaining had been made sole Trustee hereunder in the first instance.

In case of the resignation, inability, or refusal to act of the said Lora Smith Cowan and Bessie Smith Bullard or the survivor of them as such successor Trustees or Trustee hereunder, then I hereby empower and authorize the said Bessie Smith Bullard and Lora Smith Cowan, or the survivor of

them, to nominate and substitute, by an instrument in writing to be filed in the office of the Recorder of Deeds in the County in which this my Last Will and Testament shall have been filed for probate, any bank or trust company doing business in Lake County or Cook County, Illinois, qualified to accept trusts, as successor Trustee in the place of Lora Smith Cowan and Bessie Smith Bullard or the survivor of them. Or in the event said Bessie Smith Bullard or Lora Smith Cowan during their joint lives, or the survivor of them during her life, shall fail to nominate and substitute a successor Trustee as hereinabove provided, then I hereby authorize and empower the survivor of said two persons to nominate and substitute, in and by her Last Will and
138 Testament, any bank or trust company doing business in Lake County or Cook County qualified to accept trusts, as such successor trustee in place of said Lora Smith Cowan and Bessie Smith Bullard or the survivor of them, and said corporate successor trustee under either of said methods of nomination and substitution shall thereupon be vested with all the title, rights, powers, privileges, immunities, duties, discretions, and obligations herein conferred upon and vested in the executor and trustee first named, with the same force and effect as if such successor had been made the first trustee hereunder.

Thirteenth: I hereby direct that all estate, inheritance, and other succession taxes, and all duties and transfer charges and expenses which may be levied upon or incurred in connection with any bequest, legacy, or devise contained in this, my Will, shall be paid out of the corpus of my estate by my Executor or Trustee.

Fourteenth: I hereby revoke all former or other wills and testamentary dispositions by me at any time heretofore made.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal this 8th day of March, A. D. 1932.

Clara R. Smith (Seal)

The foregoing instrument was subscribed, sealed, published, and declared by said testatrix, Clara R. Smith, as and for her Last Will and Testament in our presence and in the
139 presence of each of us, and we at the same time, at her request, in her presence, and in the presence of each other, hereunto subscribe our names and residences as attesting witnesses this 8th day of March, 1932.

_____ residing at _____

_____ residing at _____

_____ residing at _____

140 **EXHIBIT 6.**

Filed at Hearing Feb. 13, 1935.

This Agreement Made and entered into this 17th day of February, A. D. 1932, by and between Clara R. Smith, First Party and Virginia Winslow Smith, Second Party, both of Highland Park, Lake County, Illinois,

Witnesseth That:

Whereas First Party has filed her bill of complaint in the Superior Court of Cook County to cancel a voluntary settlement in trust and for an accounting, in a certain cause entitled Clara R. Smith, Complainant, *vs.* Continental Illinois Bank and Trust Company, as Successor Trustee, *et al.*, General No. 547563, the purpose of which is to cause to be declared void, inoperative and ineffective because in violation of the rule against perpetuities, a certain trust agreement executed by First Party on the 3rd day of March, 1927, under which agreement she conveyed to her son, Edward A. Smith, as Trustee, certain securities to be held thereunder, reserving to herself a life estate in the income of the said trust estate and making further provision for her two daughters and said son, or in the event of his death for his widow, and containing other provisions as set forth in the said agreement; and

Whereas in that bill of complaint First Party has further prayed for a decree by the court that by reason of the violation of the rule against perpetuities the whole of the trust arrangement so created should be destroyed and rendered void, that the trust by said agreement should be ended
141 and terminated in toto, and that Continental Illinois Bank and Trust Company, Successor Trustee to the said Edward A. Smith, who departed this life on the 16th day of December 1928, be ordered to account for and assign, transfer and set over to First Party all of the assets and property held by it in trust, and that she may thereupon hold and possess the same as her own absolute property free and clear of any trust declared in said trust agreement and free and clear of any right, claim or demand of any of the defendants in said suit, or of any person claiming by, through or under the provisions of said trust agreement; and

Whereas Virginia Winslow Smith, Second Party, is the widow of the said Edward A. Smith, the son of First Party,

and the original Trustee under the terms of said trust instrument, and is a party defendant in the said suit;

Now, Therefore, in consideration of the premises and of the mutual covenants herein contained, and of the sum of One Dollar ($1.00) in hand paid by each of the parties hereto to the other, the receipt and sufficiency of which the parties hereto mutually confess and acknowledge, the parties hereto covenant and agree with each other as follows, to wit:

In the event Second Party, the said Virginia Winslow Smith, shall consent to a decree in the said suit in accordance with the prayer of the bill filed by First Party therein, First Party for herself, her heirs, executors and administrators, does hereby remise, release and forever discharge the
142 Second Party, her heirs, executors and administrators, of and from all manner of actions, cause, and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims, and demands, whatsoever, in law or in equity, which she may now have against Second Party, or ever had, of which her heirs, executors or administrators hereafter can, shall or may have for, upon or by reason of the trusteeship under the said trust agreement of March 3, 1927, of Edward A. Smith, the deceased husband of Second Party.

In Witness Whereof the parties hereto have hereunto set their hands and seals on the day and year first above written.

Clara R. Smith (Seal)
First Party.

Virginia Winslow Smith (Seal)
Second Party.

143 **EXHIBIT 7.**

Filed at Hearing Feb. 13, 1935.

February 17th, 1932

Continental Illinois Bank
and Trust Company,
Trust Department,
Chicago, Illinois

Clara R. Smith, Complainant, *vs.* Continental Illinois Bank and Trust Company, as Successor Trustee, *et al.*, in the Superior Court of Cook County, General No. 547563.

Dear Sirs:

As you are aware, I have filed my bill in the Superior Court of Cook County to cancel a voluntary settlement in Trust and for an accounting, in a certain cause entitled Clara R. Smith, Complainant, *vs.* Continental Illinois Bank and Trust Company, as Successor Trustee, *et al.*, General No. 547563, the purpose of which is to cause to be declared void, inoperative and ineffective because in violation of the rule against perpetuities, a certain trust agreement executed by me on the 3rd day of March, 1927, under which agreement I conveyed to my son, Edward A. Smith, as Trustee, certain securities to be held thereunder, reserving to myself a life estate in the income of the said trust estate and making further provision for my two daughters and my son, or in the event of his death for his widow, containing other provisions as set forth in the said agreement which is set forth in full in my said bill of complaint. In that bill of complaint I further prayed for a decree by the court that by reason of the violation of the
144 rule of perpetuities the whole of the trust arrangement so created should be destroyed and rendered void, that the trust by said agreement should be ended and terminated in toto, and that Continental Illinois Bank and Trust Company, Successor Trustee to my said son Edward A. Smith, now deceased, be orderd to account for and assign, transfer and set over to me all of the assets and property held by it in trust, and that I may thereupon hold and possess the same as my own absolute property free and clear of any trust declared in said trust agreement and free and clear of any right, claim or demand of any of the defendants in said suit, or of any per-

son claiming by, through, or under the provisions of said trust agreement.

One of the defendants in the said suit is Virginia Winslow Smith, who, as the widow of my said son Edward A. Smith, under the terms of the said trust agreement as it now stands, would, after my death, be entitled to a life estate in the income from one-third (1/3rd) of the said trust property. In consideration of the said Virginia Winslow Smith consenting to a decree in accordance with the prayer of the bill in the said suit, I have agreed with her that upon such a decree being entered by the court, setting aside the said trust agreement and ordering Continental Illinois Bank and Trust Company to account for and to transfer all of the assets and property held by it as Successor Trustee under the terms of the said instrument to me, that I will forthwith set up and create for her benefit a new trust containing the provisions set
145 forth in the draft of the trust agreement attached hereto, marked Exhibit "X", and now by reference made a part hereof as fully to all intents and purposes as though here set forth in full, and transferring to you, Continental Illinois Bank and Trust Company, as Trustee under the said instrument, the securities set forth in Schedule "A" attached to the said trust agreement, said securities being approximately one-third (1/3rd) of the securities now held by you as Successor Trustee under the trust agreement first aforesaid, after deducting, however, from such third a proportional part of such of the shares now held by you as Successor Trustee as shall be necessary to sell and dispose of in order to pay the expenses of the said proceeding, the shares so to be set over unto you as Trustee under the trust agreement, draft of which appears as Exhibit "X" attached hereto, being as follows:

594 shares American Can Co. Pfd.
92 shares Addressograph-Multigraph Com.
162 shares Firestone Tire & Rubber Com.
33 shares Great Northern Pfd.
180 shares International Harvester Com.
25 shares National Biscuit Pfd.
227 shares Union Pacific Com.

Accordingly, upon the delivery to you of this instrument, which delivery is to take place simultaneously with the entry by the court of such consent decree in the above entitled matter, I hereby sell, assign, transfer, convey and deliver to you the securities and property above described, such delivery to

you to be effective at once upon the entry of such decree
146 by its terms ordering you to assign, transfer and set over
unto me all of the assets held by you in the trust first above referred to, and I hereby instruct you to cause to be transferred into your name as Trustee under the said trust agreement, draft of which is set forth in Exhibit "X" attached hereto, without first causing the same to be transferred into my name, the securities and property above listed, being the same as the securities and properly referred to in Schedule "A" attached to the said trust agreement which is attached hereto as Exhibit "X", the cost of which transfer, if any, to be paid by me; and I further direct you to hold said securities under the terms of the said trust agreement, draft of which is attached hereto as Exhibit "X", the original of which trust agreement I am delivering to you simultaneously with the delivery of this instrument, the same to be held by you and administered under the terms thereof, and I further direct that you cause to be transferred into my name all other securities and property, except that above listed, the cost of which transfer shall be paid by me, and deliver the same to me.

It is my intention herein that without the lapse of any period of time between the entry of such decree setting aside the trust agreement first above referred to, and the creation of the new trust, copy of the instrument creating which is attached hereto, marked Exhibit "X", the said new trust shall be immediately set up upon the dissolution of the old one so
that the rights possessed by me to receive the income
147 therefrom during my life and the right possesed by said
Virginia Winslow Smith after my death to receive the income therefrom during her life, shall arise immediately upon the extinguishment of the similar rights, respectively, which I and the said Virginia Winslow Smith possess under the former trust agreement first above referred to.

Clara R. Smith (Seal)

State of California }
County of Santa Barbara } ss.

I, Emily H. Hayward, a Notary Public in and for said County in the State aforesaid, do hereby certify that Clara R. Smith, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that

she signed, sealed and delivered the said instrument as her free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 17th day of February, A. D. 1932.

Emily H. Hayward,
Notary Public.

(Seal)

My commission expires March .....

148 EXHIBIT 8.

Filed at Hearing Feb. 13, 1935.

155 Miramar Avenue
Santa Barbara, California
February 17, 1932

Continental Illinois Bank & Trust Company
Chicago, Illinois

Re: Clara R. Smith Trust No. 6799

Gentlemen:

You at the present time hold certain securities under the Clara R. Smith Trust No. 6799. This trust is being dissolved and a new trust of a lesser amount of shares being formed. You are receiving instructions relative to the securities in the trust and, supplementing that, I authorize you to transfer the securities which will be free in this trust according to the following tabulation, holding the stock to which you are entitled under the new trust and delivering all the other securities, when transferred, to Sellar Bullard, 39 North LaSalle Street, Chicago, Illinois, who will give you a receipt for them.

American Can Company Preferred Stock 1,824 shares

594	shares	remain with you under new trust.
100	"	Kennett Cowan, Jr., 7561 N. Ashland Blvd., Chicago, Ill.
100	"	Lora Cowan Ruehrdanz, 1027 Judson Ave., Evanston, Ill.
103	"	Sellar Bullard, 39 S. LaSalle Street, Chicago, Ill.
927	"	Clara R. Smith, c/o Sellar Bullard, 39 South LaSalle Street, Chicago, Ill.
1824	shares	

Addressograph International Corporation Common Stock 280 shares
92 shares remain with you under new trust
188 " Clara R. Smith, c/o Sellar Bullard, 39 South La-Salle St., Chicago, Ill.

280 shares

Certificate of Interest Drylith Patents 200
200 Clara R. Smith, c/o Sellar Bullard, 39 South La-Salle St., Chicago, Ill.

149 Firestone Tire & Rubber Company Common Stock 500 shares
162 shs. remain with you under new trust
338 " Clara R. Smith c/o Sellar Bullard, 39 South La-Salle Street, Chicago, Ill.

500 shs.

Great Northern Railway Company Preferred Stock 100 shares
33 shs. remain with you under new trust
67 " Clara R. Smith, c/o Sellar Bullard, 39 South La-Salle Street, Chicago, Ill.

100 shs.

International Harvester Company Common Stock 552 shares
180 shs. remain with you under new trust
372 " Clara R. Smith, c/o Sellar Bullard, 39 South La-Salle Street, Chicago, Ill.

552 shs.

National Biscuit Company Preferred Stock 75 shares
25 shs. remain with you under new trust
50 " Clara R. Smith, c/o Sellar Bullard, 39 South La-Salle Street, Chicago, Ill.

75 shs.

Union Pacific Railroad Company Common Stock 700 shares
227 shs. remain with you under new trust
473 " Clara R. Smith, c/o Sellar Bullard, 39 South La-Salle Street, Chicago, Ill.

700 shs.

I hope that the transfer expenses, particularly stamp taxes can be held down to the minimum as the expenses of the entire transaction are quite heavy.

Yours very truly,
Clara R. Smith

CRS:W

150 EXHIBIT 9.

Filed at Hearing Feb. 13, 1935.

State of Illinois } ss.
County of Cook }

IN THE SUPERIOR COURT OF COOK COUNTY,

In Chancery.

Clara R. Smith,
Complainant,
vs.
Continental Illinois Bank and Trust Company, as successor Trustee, *et al.*,
Defendants.
No. 547563.

The Joint and Several Answer of Lora Smith Cowan, Kennett Cowan, Jr., Elwyn Hewett Cowan, Lora Louise Ruehrdanz, Alfred Ruehrdanz, Jr., Bessie Smith Bullard, Sellar Bullard, Caroline Marie Bullard, Barbara Sellar Bullard, defendants herein, to the bill of complaint of Clara R. Smith, Complainant.

To the Honorable Judges of the Superior Court of Cook County, in Chancery Sitting:

The joint and several answer of Lora Smith Cowan, Kennett Cowan, Jr., Elwyn Hewett Cowan, Lora Louise Ruehrdanz, Alfred Ruehrdanz, Jr., Bessie Smith Bullard, Sellar Bullard, Carolina Marie Bullard, Barbara Sellar Bullard, defendants herein, to the bill of complaint of Clara R. Smith, complainant.

These defendants, reserving to themselves and each of them, all right of exceptions to the said bill of complaint, for answer thereto, say that they and each of them admit the alle-

gations of the bill of complaint herein and consent that a
151 final decree of this Court be entered in favor of complainant in accordance with the prayer of her bill of complaint herein.

Having fully answered, said defendants pray to be hence dismissed with costs.

Lora Smith Cowan
Elwyn Hewett Cowan
Alfred Ruehrdanz, Jr.
Sellar Bullard
Barbara Sellar Bullard
Kennett Cowan, Jr.
Lora Louise Ruehrdanz
Bessie Smith Bullard
Caroline Marie Bullard
By W. F. Peter
Their Solicitor.

152 EXHIBIT 10.

Filed at Hearing Feb. 13, 1935.

State of Illinois } ss.
County of Cook }

IN THE SUPERIOR COURT OF COOK COUNTY.

Clara R. Smith,
Complainant,
vs.
Continental Illinois Bank and Trust Company, as Successor Trustee, *et al.,* } General No. 547563.

The Answer of Virginia Winslow Smith to the Bill of Complaint of Clara R. Smith, the Complainant.

This defendant now and at all times hereafter saving and reserving unto herself all manner of benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereto, or to so much and such parts

thereof as this defendant is advised it is, or are, material or necessary for her to make answer unto, answering says:

1. This defendant admits the allegations in paragraph (1) of said bill of complaint;

2. This defendant admits the allegations in paragraph (2) of said bill of complaint;

3. This defendant admits the allegations in paragraph (3) of said bill of complaint;

4. This defendant admits the allegations in paragraph
153 (4) of said bill of complaint;

5. This defendant admits that as devisee of her said husband and otherwise the complainant has for many years last past been possessed of considerable estate and property, and that on March 3, 1927 the said complainant executed the trust agreement in the form alleged in paragraph (5) of said bill of complaint; that the securities described in said trust agreement at the time of the execution thereof were of an approximate value of Four Hundred Thousand Dollars ($400,000.00) and that the securities in said trust estate created by the said trust agreement at the date of the filing of the bill of complaint herein were of an approximate value of Three Hundred Thirty Thousand Dollars ($330,000.00), but this defendant says she has no knowledge of the other facts alleged in Paragraph (5) of the bill of complaint and demands strict proof of such other facts.

6. This defendant admits the allegations in paragraph (6) of said bill of complaint.

7. This defendant says that she is in reasonable doubt as to whether the provisions of said trust agreement quoted in paragraph (7) of said bill of complaint are void or inoperative or violate the rule against perpetuities.

8. This defendant says that she has no knowledge with respect to the facts alleged in paragraph (8) of said bill of complaint and demands strict proof thereof.

154 9. This defendant further says that she is in doubt as to whether even if the provisions of the said trust agreement quoted in paragraph (7) of said bill of complaint are inoperative or ineffective and violate the rule against perpetuities, the said trust agreement as a whole should, even if the facts alleged in paragraph (9) are true, be declared inoperative or ineffective or the trust property turned over to the complainant.

10. This defendant says that she has no knowledge with

respect to the facts alleged in paragraph (10) of said bill of complaint and demands strict proof thereof.

Wherefore this defendant, not conceding or admitting that the complainant is entitled to have said trust agreement declared void and ineffective and violative of the rule against perpetuities, or to have the trust property turned over to her, and being ready at all times fully to present the matter to the court so that the court will be fully advised in the premises, does hereby on account of her doubts as to whether or not the provisions of said trust agreement quoted in paragraph (7) of said bill of complaint are void or ineffective or violate the rule against perpetuities, and her further doubts as to whether, if said provisions are void and ineffective and violate the rule against perpetuities, the whole trust agreement should be declared inoperative and ineffective and
155 the trust property turned over to the complainant, requests this Honorable Court for a decree determining the said questions.

Virginia Winslow Smith,
By Cassels, Potter & Bentley,
Her Solicitors.

156 PETITIONER'S EXHIBIT 11.

Admitted in Evidence Feb. 13, 1935.

January 15, 1932.

Mrs. A. P. Smith,
155 Miramar Avenue,
Santa Barbara, California.

Dear Mother:

This morning I had quite a meeting with Sam and went over all the drafts of your Will, the small trust for Mollie Dibble, Eugenia Moore, etc., and the decree. Both your Will and the Trust take up a lot of paper in reference to the powers of the Trustee in regard to real estate and the giving of easements, etc. It is always conceivable that some securities purchased may have to be foreclosed and, if so, the real estate acquired; therefore, this long, legal, technical language. There is no thought of the Trustee going into the real estate business. I just give you this information at this time

so that when the documents reach you you do not need to be unduly worried about a lot of that phraseology.

These papers are not going forward to you until Sam has heard finally from Bentley, Virginia's attorney. The reason for the delay is that Virginia through him has wanted more rights than existed in the present trust, that is, she wanted to have the right to say whether securities should be sold or purchased during your lifetime, also after the trust income is paid to her. This is neither equitable nor logical and I have told Sam that the only thing that would be done would be to give the same rights that are in the present trust, that is, you have the right during your lifetime to say that securities shall be sold, after that the Trustee has entire say. Everyone else so far has O. K.'d all the papers and it will be now of matter of just waiting Virginia's convenience.

A good deal of mail was at the house last night for you and Bessie is forwarding it. I have taken out a statement showing your current dues for $10.00 to Save-the-Redwoods League. My reason for doing it is that the form that they make the statement in is quite interesting and as we will have to make another drive for the Hospital, I want to use this form. Therefore, if you want to send $10.00 for the cur-
157 rent dues for the Save-the-Redwoods, send your check to:

Dr. Robert G. Sproul,
220 California Hall,
University of California,
Berkeley, California.

The address on your statement is 29 Ocean View Avenue, Santa Barbara.

I received your two telegrams, one saying that you wanted more money in the Highland Park State Bank and the other that you were not over drawn. I therefore did not act.

Miss Newell seems to be some better and has reconciled herself to the idea that she cannot go west when Aunt Lora goes. I saw her the night before last and Bessie saw her yesterday. We try to drop in on her quite regularly.

Much love to all.

Affectionately,

SB:W

158 PETITIONER'S EXHIBIT 12.

Admitted in Evidence Feb. 13, 1935.

January 20, 1932.

Mrs. Clara R. Smith,
155 Miramar Avenue,
Santa Barbara, California.

Dear Mother:

I am sending you under separate cover, and enclose in it a carbon of this letter, the new trust for the payment of $20.00 a month by me to Mollie Dibble, Gertrude Barbour, Eugenia Moore; and your will, together with a letter that Sam Holmes has written.

I wish you would read over both the trust and the will so that you will be absolutely satisfied with them, also Sam's letter, which gives instructions as to the signing of the will. This will, however, should not be signed until the present trust has been voided by act of court and as Sam outlines this will be some while yet, as Virginia has not entirely okehed everything. There is no reason, however, why you should not sign the new trust enclosed herewith as it will not become operative until I accept it and receive the 103 shares of American Can Preferred and I cannot do that until the old trust is voided.

Sam has inserted on the trust indenture various instructions. He calls attention in his letter to the fact that this trust of 103 shares American Can is irrevocable. That was our understanding as the purpose of making this trust at this time is to get the income which is being paid to the three nieces out of your Income Tax and to save, if possible, any inheritance taxes.

As to the signing of the will. I have above stated not to sign this until you get word from us that the trust is voided and prior to that time you will receive the new trust that you will have to execute for Virginia. When the time has arrived for executing this will, Sam has pointed out that the witnesses must not be any one benefitted by the will—preferably, some one who lives in or near Chicago. That is not so very vital, for the reason that when you get back here to Chicago in the summer, I think the will could be executed again with local residents as witnesses. If there are no Chicago residents,

Aunt Lora Knight, Sam Brown and Frank Wymond might act, or any one or two of them with some one else that you suggest.

159 I am sending all of this on with the letter so that you may have ample time to thoroughly read both.

I have no suggestions as to either but will be glad to answer any questions.

Affectionately yours,

SB.LC

160 PETITIONER'S EXHIBIT 13.

Admitted in Evidence Feb. 13, 1935.

February 1, 1932.

Mrs. A. P. Smith,
155 Miramar Avenue,
Santa Barbara, California.

Dear Mother:

I am sending you under separate cover your bank statement with notations made as to what constitutes the deposits. A couple of days ago I notified you of depositing $500 worth of coupons for collection, credit to be applied February first and today I am depositing to your account the following:

The Fair	$437.50
Commonwealth Edison Company	630.00
Danly Machine Specialties, Inc.	300.00

making a total of $1,367.50.

I today called up the Continental Trust Department and asked them not to deposit, for the time being, any further dividends to your account. The amount for the latter part of January and February is not much, but I thought if we could build up a slight credit in the Trust it might be easier to use that method to try to get some of the expenses which will be made in cancelling the present trust as an income tax deduction. Bentley called Sam Saturday afternoon and said that he was now authorized to discuss the terms of the Trust with the Trustee, meaning that word from Boston apparently is that a new trust is now satisfactory. So I am hoping that today or tomorrow the Trustee will approve the form and that matter can be cleaned up and the new trust put in effect.

We had a very nice visit and dinner with Lora in Evanston yesterday noon. Ken and Elwin were there and they all look

very well. The weather dropped to quite a low temperature, but today it is warming up and there was quite a little snow this morning.

This afternoon we are all going to Katharine Roberts funeral which is to be held from Mrs. Marsh's apartment in Chicago.

Much love from all of us.

Affectionately,

SB:W

161 PETITIONER'S EXHIBIT 14.

Admitted in Evidence Feb. 13, 1935.

February 9, 1932.

Mrs. A. P. Smith,
155 Miramar Avenue,
Santa Barbara, California.

Dear Mother:

I have looked over the various papers which are going forward to you from Sam and they cover the matter in a satisfactory way.

With the new trust for Virginia is a letter drawn by her attorney instructing the Continental to hold the securities that should go into the trust. Attached to this is another letter that I have written giving them particularly the instructions for the free securities. They all go into the trust or go into you name with the exception of certain American Can Preferred Stock. The two lots of 10 shares each to Kennett and Lora are what you discussed here in giving them something now and when the 100 shares of Kennett's are ready for delivery I shall get from him the $10,000 Devon Safe Deposit Bonds which he now holds. The 103 shares made out to my name are for the trust which you are setting up for Molly, Gene, etc.

Affectionately,

SB:W

162 EXHIBIT 15.

Filed at Hearing Feb. 13, 1935.

Postal Telegraph

RXSA185 42—Santa Barbara Calif 15 1125A
1932 Feb 15 PM 2 05
Sellar Bullard—
Care Hitchcock and Co 39 South LaSalle St Chicago Ill—

My understanding of new trust agreement permits bank to change any or all securities on Schedule A without my consent Stop Is my understanding correct and do you feel that such proceedure is wise I do not wire your understanding and advice—

Mother

163 PETITIONER'S EXHIBIT 16.

Admitted in Evidence Feb. 13, 1935.

February 16, 1932.

Mrs. A. P. Smith,
155 Miramar Avenue,
Santa Barbara, California.

Dear Mother:

Yesterday I received your wire about the trust agreement and I answered you as follows:

"Old trust permits Trustee to do anything without consent after your death. New trust authorized purchase of only legal trust fund investments. Virginia insisted she have voice if anyone had so I cut out all consent feeling sure Trustee would make no changes except to improve capital value."

When you told Virginia that you would set up a new trust or do anything that would be satisfactory to her and told Sam that you did not wish to have any court fight but have it settled in a quiet way, you put it in the power of Virginia's lawyers to accept or refuse within certain limitations any proposition, so that it was impossible for Sam and me to put up a trust and tell them to take it or leave it and this was the best compromise we could make; also, it was more difficult

to handle this in a reasonable time because Virginia insisted that her Chicago attorneys refer everything to a Boston attorney and it took any place from four days to a week after the thing seemed satisfactory to the Chicago attorney to get the approval of the Boston attorney.

The new trust comprises only one-third of the original trust and your primary interest is in the maintenance of the principal—even at a sacrifice of the income. Virginia told her lawyer that if you or any one other than herself during your life time had the say that probably the funds would be invested in Liberty Bonds so as to have as small an income as possible when she had the right to take the income. With that attitude on her part and her insistence that if any one other than the trustee was authorized, that during her life time when she should enjoy the trust, she should have the right to say what should be bought, it seemed wisest to cut out all consent and then when the trust is in being to have the remainder men (i. e., Lora and Bessie) tell the trustee that they would be held responsible if they made any changes which would jeopardize the trust principal or interest.

I hope the above is clear. I realize it is not perfectly satisfactory but it seemed the best out of a bad mess.

Affectionately yours,

SB.LC

164 EXHIBIT 17.

Postal Telegraph

SA284 13—Santa Barbara Calif 17 140P
1932 Feb 17 PM 4 11
Sellar Bullard, Care Hitchcock and Co—
39 South LaSalle St Chicago Ill—

Sending sundry papers relative to trust matters regular registered mail special delivery today—

Sam M. Brown.

165 PETITIONER'S EXHIBIT 18.

Admitted in Evidence Feb. 13, 1935.

February 26, 1932.

Mrs. A. P. Smith,
155 Miramar Avenue,
Santa Barbara, California.

Dear Mother:

Yesterday afternoon the Continental, their attorney, Mr. Concannon (representing the minors), Bill Peter (representing the other parties in interest), Mr. Bentley of Cassels, Potter & Bentley (representing Virginia), Sam and I went before the Judge at the County Building and all papers were filed and the Judge expects to hand down a favorable opinion Saturday at noon. When that is received, I shall wire you suggesting that you sign the will that you have in California, and if you will then wire back that the will is signed, I shall accept the new trust for Mollie, Gene, etc.

As soon as the Judge hands down the opinion Saturday, your old trust will be dissolved and the trust for Virginia will be immediately in being and in due course the Continental will release the excess securities that they have. This, of course, may be a matter of a week or ten days to get it to the Transfer Agent and back again.

In order to put all the matters before the Court, it was necessary to deliver the checks to cover the agreed expenses, which amounted to $6,860.00. Yesterday, according to the bank, you had over $13,000.00 in the bank, so I drew the checks for the following amounts and for the following names, numbering them 1 to 6:

#1—Continental Illinois Bank and Trust Company	$1,000.00
#2—W. F. Peter—fee and disbursements.....	105.00
#3—Mayer, Meyer, Austrian & Platt.....	500.00
#4—McNab, Holmes & Long.....	3,500.00
#5—Matthias Concannon—gdn ad litem.....	505.00
#6—Cassels, Potter & Bentley.....	1,250.00
	$6,860.00

I expect to have your and Lora's Income Tax Returns ready in the next day or two and will forward them on for both of your signatures.

Affectionately yours,

SB.LC

166 EXHIBIT 19.

Filed at Hearing Feb. 13, 1935.

1/25/32—re Will & Trust

Hotel
Vista Del Arroyo
and Bungalows
Pasadena
California.

My dear Sellar—

Your Aunt Lora, and Lora C. and I came down here to see your Aunt Bess and Lora Whiting safely started for home. It has been a joy having them here with us and we are very sorry they could not stay longer.

Excuse mistake, but it two thirty P. M. and I am writing to you while the rest have gone to the train.

Regarding the Barker mortgage—indeed I do not wish the property and certainly hope they may sell or rent it. I do not think they have any idea that I hold the mortgage. As you suggested I shall not sign the will until matters are settled regarding the trust. The papers came just as we were leaving home, but I shall attend to them as soon as I return.

Sam is much better and quite cheerful and seems happy to have your Aunt Lora here. Our busy time has come, we (your Aunt Lora) is already planning a trip to Death Valley but I like to see new places as well as she does, so it is all a joy. I am sorry Miss Newell is gaining so slowly. It does not seem as though she will be able to come out here this winter. What does the doctor say about it?

167 Good night dear. I am a bit tired after a very active day.

Much love always—

Mother.

1/25/32

168 EXHIBIT 20.

Filed at Hearing, Feb. 13, 1935.

State of Illinois } ss.
County of Cook }

IN THE SUPERIOR COURT OF COOK COUNTY.

In Chancery.

Clara R. Smith
vs.
Continental Illinois Bank and Trust Company, as Successor Trustee, *Et Al.* } No. 547563.

DECREE.

This cause coming on to be heard upon the Bill of Complaint of Clara R. Smith and on the answers filed herein by the defendants, Continental Illinois Bank and Trust Company as successor trustee, Lora Smith Cowan, Kennett Cowan, Jr., Elwyn Hewett Cowan, Lora Louise Ruehrdanz, Alfred Ruehrdanz, Jr., Bessie Smith Bullard, Sellar Bullard, Caroline Marie Bullard, Barbara Sellar Bullard, Virginia Winslow Smith, and Paul Charles Cowan and Clara Jean Bullard, infants by Matthias Concannon, their guardian ad litem, and upon the replication filed herein by the complainant to said answers, and upon the account of Continental Illinois Bank and Trust Company as successor trustee under the trust agreement executed by and between Clara R. Smith,
169 Depositor, and Edward A. Smith, Trustee, on March 3, 1927, of all its receipts and disbursements and of all its acts and doing as such successor trustee and of all the receipts and disbursements, acts and doings of Illinois Merchants Trust Company, its predecessor corporation, from January 24, 1929 up to and including the 27th day of February, 1932, in regard to all the property of the said trust estate which has come into its hands or the hands of Illinois Merchants Trust Company as such successor trustee, which said account is hereinafter termed the account of Continental Illinois Bank and Trust Company, as successor trustee; and the said com-

plainant now coming into court and moving that a decree be entered herein in accordance with the prayer of her bill, and the defendant, Continental Illinois Bank and Trust Company, as such successor trustee, now coming into court and moving that its account as such successor trustee be approved and that the expenses of the parties hereto in connection with this proceeding, including reasonable trustee's and solicitors' fees and the costs and expenses of this proceeding, be approved and allowed by the court and that the Court may order and direct said fees and expenses when so approved and allowed to be paid out of the funds of the trust estate; and each and all of said defendants to said bill having been heretofore duly notified of the making and filing herein of said account of said Continental Illinois Bank and Trust Company as successor trustee as aforesaid and of said motions of said complainant and said defendant, Continental Illinois Bank and Trust Company as successor trustee, and counsel for said complain-
170 ant and counsel for the defendant and each of them, and Matthias Concannon as guardian ad litem for Paul Charles Cowan and Clara Jean Bullard, minors, appearing in open court and having been heard, and the court having considered the issues and the evidence adduced by the parties respectively in open court and the arguments of counsel and having considered said account of said Continental Illinois Bank and Trust Company as successor trustee as aforesaid and being fully advised in the premises, Doth Find:

That it has jurisdiction of all the parties hereto and of the subject matter of this cause;

That the complainant is a woman of seventy-six years of age; that she was married to Albert Paul Smith of Chicago, Illinois and lived with said Albert Paul Smith in said city until his death in the year 1890; that three children were born of said marriage, to-wit: Edward, Lora, and Bessie; that shortly after the death of said Albert Paul Smith said complainant moved to the City of Highland Park with her said three children, and that since said time she has maintained her home in said City of Highland Park without remarrying;

That the complainant's son, Edward, known as Edward A. Smith was, in the year 1912, married to Virginia Winslow; that the said Edward A. Smith died on December 16, 1928, leaving said Virginia Winslow Smith, his widow, and leaving no child or children or descendants of any child or children surviving him;

That said daughter Lora became intermarried with one
171 Kennett Cowan, from whom she has since been divorced,
and is now known or Lora Smith Cowan; that of said marriage two children were born and are now living, to wit: Kennett Cowan, Jr., and Lora Louise Cowan; that Lora Louise Cowan has intermarried with one Alfred Ruehrdanz, Jr., and is now known as Lora Louise Reuhrdanz; that of said marriage no children have been born; that said Kennett Cowan, Jr., has intermarried with one Elwyn Hewett now known as Elwyn Hewett Cowan, and that of said marriage Paul Charles Cowan has been born, who is now a minor;

That said daughter Bessie has intermarried with Sellar Bullard and is now known as Bessie Smith Bullard; that of said marriage three children have been born and are now living, to wit: Caroline Marie Bullard, born January 7, 1912, Barbara Sellar Bullard, born January 24, 1913, and Clara Jean Bullard, born October 2, 1917; that said Clara Jean Bullard is now a minor;

That said complainant for many years last past has been possessed of considerable estate and property, the great bulk of which consisted of stocks, bonds, and mortgages on real estate; that during the years preceding 1927, out of love and affection for her said three children, she made outright gifts to them of sums of money and securities; that in making said gifts it was the complainant's purpose and endeavor to benefit each of her said children equally and without preference or favoritism, and that in the accomplishment of said gifts
said complainant, prior to March 3, 1927, distributed
172 approximately $150,000.00 to each of said children;

That on the 3d day of March, 1927, complainant, as depositor, made and entered into a certain trust agreement with her said son, Edward A. Smith, as Trustee; that said trust agreement is fully and truly set forth in the body of said bill of complaint filed herein; that immediately after the execution of said trust agreement and pursuant thereto the complainant transferred and delivered the securities described therein to her said son, Edward A. Smith, as Trustee under said agreement, and that thereafter until the death of said Edward A. Smith the said securities remained in his name as such Trustee and in his possession, and that said securities had, on the date of the execution of said trust agreement, a market value of to wit: approximately $400,000.00, and that the total value of said trust estate is now approximately $300,000.00;

That after the execution of said trust agreement said Edward A. Smith continued to act as trustee thereunder until the time of his death on, to wit: December 16, 1928; that the Illinois Merchants Trust Company, named as successor trustee under said trust agreement, accepted said trust as such successor trustee on January 24, 1929 and became, subsequent to said last mentioned date, merged or consolidated with a certain other corporation or corporations having trust powers, and that the corporation resulting from such merger or consolidation is known as the Continental Illinois Bank and Trust Company; that said Continental Illinois Bank and Trust
173 Company has succeeded to all the rights, privileges, duties, liabilities, powers, and trusts resident in said Illinois Merchants Trust Company, including said rights as successor trustee under said trust agreement, and that said Continental Illinois Bank and Trust Company is now acting as successor trustee under the aforesaid trust agreement;

That certain of the provisions of said trust agreement designed to control and effect the disposition of income and principal of the portion of said trust fund set aside for the complainant's son, Edward A. Smith, to wit: $100,000.00, plus such other sum as might come to said share by reason of Edward A. Smith's predeceasing the complainant, were and are invalid, inoperative, void and ineffectual because violative of the rule against perpetuities; that said void and inoperative provisions in said trust agreement are as follows:

"Upon the death of Depositor's son, Edward A. Smith then the income from said sum so set aside for him shall be paid to his widow for and during her natural life unless he shall leave him a child or children surviving, in which event said income shall be paid to such child or children until said youngest child arrived at the age of twenty years at which time the principal of said trust estate shall be divided among the children of Depositor's said son share and share alike. It being the intention that in the event that all of the children of Depositor's said son have arrived at the age of twenty years prior to his decease, that then distribution of said principal shall be made immediately after his decease. In the event of the death of any of his said children prior to the time of the distribution of the said principal sum hereunder, then the income shall be paid to the heirs-at-law of such deceased child or children according to the present laws of descent of the State of Illinois until time for the final distribution of said sum whereupon said principal sum shall likewise be paid

to such heirs-at-law of such deceased child or children. In the event Depositor's said son shall leave him no child or
174 children surviving, then the principal of said trust estate shall upon the death of both himself and his widow be paid one-half to the children of Depositor's daughter, Lora Smith Cowan, and one-half to the children of Depositor's daughter, Bessie Smith Bullard, the heirs-at-law of any deceased child to receive the part such deceased child would have received if living";

and that by virtue of the provisions contained in the paragraph immediately following said void and inoperative provisions of said trust agreement, said Edward A. Smith having predeceased complainant, one-third of the value in excess of $300,000.00 of said whole trust fund at the time of complainant's death was and is likewise affected by said void and inoperative provisions, so that the trust agreement wholly fails to effect any valid disposition of a full one-third of the whole amount of said trust fund;

That said provisions last above quoted for the disposition of the share of Edward A. Smith under said trust violates said rule against perpetuities in this, that the corpus of said share is so limited as to remain contingent and unvested until after the expiration of the life of said complainant, the expiration of the life of said Edward A. Smith, and the expiration of the life of any person whom he may leave surviving him as his widow; that it was possible that said Edward A. Smith might survive the complainant and marry a woman not in being at the time of the execution of said trust agreement or at the time of the death of complainant herein and who might survive said Edward A. Smith and all other persons named in the said instrument for a period of more than
175 twenty-one (21) years, and consequently that said corpus might not vest in any person for a longer period then a life or lives in being and twenty-one (21) years thereafter, as said rule requires;

That said trust agreement, by reason of said violation of said rule against perpetuities, was and is wholly inoperative and ineffective as to one-third of said trust fund; that said complainant intended and conceived the disposition of the whole of said trust fund as one single and connected distributive scheme and would not have created said trust and provided for the payment of either income or principal of any part of said fund to said Edward A. Smith or to any other beneficiary named in said instrument if she had known or had

been advised that the provisions therein for distribution to the children of her son Edward surviving him were void, or that the further provisions for the distribution of shares designed for such children effective in the event he should leave no child surviving him were void, and that by reason of the ineffectiveness of said provisions disposing of the corpus of said share so set aside for said Edward A. Smith the whole of said scheme and trust arrangement is destroyed and rendered void;

That all the assets and property held by the said Continental Illinois Bank and Trust Company as such successor trustee in said trust are the complainant's own absolute property free and clear from any trust declared in said trust agreement and free and clear of any right, claim, or demand of the defendants herein or any of them, or any person represented in this suit by said defendants or any of them, or
176 any persons claiming by, through, or under the provisions of said trust agreement;

That the defendant, Continental Illinois Bank and Trust Company, as successor trustee as aforesaid, has submitted to the court a full, true, and just account of all its receipts and disbursements and of all its acts and doings as such successor trustee as aforesaid from January 24, 1929 up to and including the 27th day of February, 1932 in regard to all the property transferred, conveyed, and delivered to it as successor trustee under said trust agreement executed by and between Clara R. Smith, Depositor, and Edward A. Smith, Trustee, under date of March 3, 1927; that said Continental Illinois Bank and Trust Company and said Illinois Merchants Trust Company, its predecessor corporation, as successor trustee as aforesaid, have duly managed and administered the trust property and collected the income and profits thereof and disbursed the same in accordance with and as authorized by said trust agreement of March 3, 1927; that all the net income arising from said trust received by said Illinois Merchants Trust Company and/or Continental Illinois Bank and Trust Company as such successor trustee from January 24, 1929 to February 27, 1932 has been paid by said successor trustee to the complainant in accordance with the provisions of said trust agreement; that said account is a full, true, and correct account up to and including said February 27, 1932 of the management and administration of said trust estate by

said successor trustee, and of all its collections and dis-
177 bursements of principal, income, and profits thereon;

That the following is a full, true, and complete list of all the property held on February 27th, 1932 by said Continental Illinois Bank and Trust Company as successor trustee under said Trust Agreement of March 3, 1927, to wit:

1824 shares American Can Co. Preferred Stock—Par Value $100;

280 shares Addressograph International Corp., Common Stock—No Par Value;

200 shares Certificate of Interest Drylith Patents owned by American Multigraph (This block of stock was received on January 13, 1931 in exchange for 200 shares American Multigraph Common Stock in the original trust and also originally received by the present trustee).

500 shares Firestone Tire & Rubber Co. Common Stock —Par value $10. (This was originally 100 shares and on October 28, 1929 a stock divident of 400% was paid, making the number of shares held 500).

100 shares Great Northern Railway Co. Preferred Capital Stock—Par Value $100.

552 shares International Harvester Co. of New Jersey Common Stock—No Par Value. (This was on March 3, 1927 130 share of Common Stock of $100 par value. Through stock dividends July 25, 1927 and 1928 and the purchase of 2 35/50 shares in July, 1928, this block was raised to 138 shares by the end of 1928. In December 1928 there was a split-up of four to one; this split occurred prior to the Continental's taking over the trust, but the actual exchange of certificates was not made until after they took over the trust; so, they originally held 138 shares and exchanged them for 552 shares no par value.)

75 shares National Biscuit Co. Preferred Stock—Par Value $100.

700 shares Union Pacific Railroad Co. Common Stock —Par Value $100.

That all the expenses of this proceeding, including
178 trustee's fees, court costs, fees and disbursements of solicitors for all the parties hereto, and the fees and disbursements of Matthias Concannon, guardian ad litem for Paul Charles Cowan and Clara Jean Bullard, minors herein, should be paid out of the corpus of said trust estate;

That the sum of $1,000.00 is a reasonable, customary, and usual fee for the services rendered by the Continental Illinois Bank and Trust Company as successor trustee in this accounting; that the sum of $500.00 is the usual and customary fee for the services rendered by Mayer, Meyer, Austrian & Platt as solicitors for said Continental Illinois Bank and Trust Company as successor trustee, and that said sum of $500.00 is a reasonable sum to be allowed to said Continental Illinois Bank and Trust Company as successor trustee for their expenses for the solicitors' fees of Mayer, Meyer, Austrian & Platt; that the sum of $100.00 is the usual and customary fee for the services rendered by William F. Peter as solicitor for the defendants, Lora Smith Cowan, Kennett Cowan, Jr., Elwyn Hewett Cowan, Lora Louise Ruehrdanz, Alfred Ruehrdanz, Jr., Bessie Smith Bullard, Sellar Bullard, Caroline Marie Bullard, and Barbara Sellar Bullard, and that said sum of $100.00 is a reasonable sum to be allowed to said defendants for their expenses for the solicitor's fee of William F. Peter; that the sum of $1,250.00 is the usual and customary fee for the services rendered by Cassels, Potter & Bentley as solicitors for the defendant, Virginia Winslow Smith, and that said sum of $1,250.00 is a reasonable sum to be allowed to said defendant, Virginia Winslow Smith, for her expenses for
179 the solicitors' fees of Cassels, Potter & Bentley; that the sum of $2,500.00 is the usual and customary fee for the services rendered by McNab, Holmes & Long as solicitors for the complainant, Clara R. Smith, and that said sum of $2,500.00 is a reasonable sum to be allowed said complainant for her expenses for the solicitors' fee of McNab, Holmes & Long; that Matthias Concannon as guardian ad litem herein has necessarily and properly expended the sum of $5.00 as costs and expenses in this proceeding, and that $500.00 is the usual and customary fee and is a reasonable fee for his services herein as guardian ad litem for Paul Charles Cowan and Clara Jean Bullard, minors herein;

That the persons named as defendants to the complainant's bill of complaint are the only persons now in being who by any contingency or possibility whatever now have or here-

after may claim any right, title, or interest, beneficial or otherwise, in or to the trust fund established and held under said trust agreement aforesaid, and that the persons so named as defendants represent in equity all and singular the persons now in being or who hereafter may be born who might under any contingency become entitled to any estate, right, title, or interest in or to said trust trust.

It Is Therefore Ordered, Adjudged, and Decreed That the said trust agreement entered into on March 3, 1927 by and between the complainant, Clara R. Smith, as depositor, and her son, Edward A. Smith, as Trustee, and the trusts
180 thereby declared, are wholly inoperative, void, and of no effect, for the reasons hereinbefore stated and the said trust agreement and the trusts thereby attempted to be created, and each and every of the same, are hereby declared to be wholly inoperative, void, and of no effect.

It Is Further Ordered, Adjudged, and Decreed That all the assets and property held by said Continental Illinois Bank and Trust Company as such successor trustee in said trust are the complainant's own absolute property, free and clear from any trust declared in said trust agreement, and free and clear of any right, claim, or demand of the defendants herein or any of them, or any person represented in this suit by said defendants or any of them, or any person claiming by, through, or under the provisions of said trust agreement.

It Is Further Ordered, Adjudged, and Decreed That the defendant, Continental Illinois Bank and Trust Company, as successor trustee as aforesaid, has herein rendered a full, true, and correct account of all its receipts, disbursements, and investments as such successor trustee as aforesaid, and of the principal and of the income and profits of all the property which has at any time heretofore belonged to the trust estate whereof the said Continental Illinois Bank and Trust Company has been and is successor trustee as aforesaid, and of the acts and doings of such successor trustee under said trust agreement from the 24th day of January, 1929, the date on which said successor trustee accepted said trust, up
181 to and including the 27th day of February, 1932, and as to the condition of the trust estate and the trust property and affairs up to and including said last mentioned date, and that said account ought to be and the same hereby in all respects is fully approved and confirmed.

It Is Further Ordered, Adjudged, and Decreed That said Continental Illinois Bank and Trust Company, as such suc-

cessor in trust, forthwith assign, transfer, and set over to the complainant, Clara R. Smith, all the assets and properties hereinbefore found to be held by it now as such successor trustee.

It Is Further Ordered, Adjudged, and Decree That all the expenses of this proceeding, including court costs, trustee's fees, and the fees and disbursements of the parties for their respective solicitors, and of Matthias Concannon, guardian ad litem of Paul Charles Cowan and Clara Jean Bullard, minors herein, as heretofore found, be paid by the complainant out of the corpus of said trust estate.

It Is Further Ordered, Adjudged, and Decreed That the parties to this cause represent in equity all and singular the persons now in being or who may hereafter be born who are or may hereafter under any contingency become entitled to any estate, right, title, or interest in or to the trust fund held under the trust agreement hereinbefore described, and that this decree will bind and conclude all and singular such person or persons and their estate and interests claimed by, through, or under said trust agreement.

182 Whereupon said Continental Illinois Bank and Trust Company, as such successor trustee, now here in open Court, and in obedience to this decree, does assign, transfer, and set over to the complainant, Clara R. Smith, all the assets and properties hereinbefore found to be held by it now as such successor trustee, and it is therefore Further Ordered, Adjudged, and Decreed That said Continental Illinois Bank and Trust Company be and it hereby is forever discharged and released from all claim, demand, accounting, liability, or responsibility as such successor trustee.

And it now appearing to the Court that the complainant, Clara R. Smith, now here in open Court, has paid to the parties respectively, and to Matthias Concannon, guardian ad litem for Paul Charles Cowan and Clara Jean Bullard, minors, the sums hereinbefore ordered to be paid by said complainant out of the corpus of said trust estate, it is Ordered that this decree against said complainant for the expenses of this proceeding be and the same hereby is satisfied.

Enter:

William J. Lindsay,
Judge.

183 EXHIBIT 21.

Filed at Hearing, Feb. 13, 1935.

Last Will and Testament.

I, Clara R. Smith, of the City of Highland Park, County of Lake, and State of Illinois, do hereby make, publish, and declare this my Last Will and Testament, in manner and form following:

First: I direct that all my just debts and funeral expenses be paid as soon after my decease as conveniently can be done.

Second: I give and bequeath to my two daughters, Bessie Smith Bullard and Lora Smith Cowan, all my books, pictures, rugs, silverware, bric-a-brac, household furniture and furnishings, automobiles, wearing apparel, jewelry, goods and chattels, the same to be divided equally between them.

Third: A. I give and bequeath to my grandson, Kennett Cowan, Jr., the sum of Fifteen Thousand Dollars ($15,000.00);

B. I give and bequeath to my granddaughter, Lora Cowan Ruehrdanz, the sum of Fifteen Thousand Dollars ($15,000.00);

C. I give and bequeath to my granddaughter, Caroline Marie Bullard, the sum of Twenty-five Thousand Dollars ($25,000.00);

D. I give and bequeath to my granddaughter, Barbara Sellar Bullard, the sum of Twenty-five Thousand Dollars ($25,000);

E. I give and bequeath to my granddaughter, Clara Jean Bullard, the sum of Twenty-five Thousand Dollars ($25,000.00);

F. It is my hope that my grandchildren will conserve the principal of the foregoing bequests and spend only the income therefrom.

Fourth: I give and bequeath to my friend, Ina C. 184 Newell, the sum of Five Thousand Dollars ($5,000.00).

Fifth: I give and bequeath to my chauffeur, John Zehren, the sum of Five Thousand Dollars ($5,000.00).

Sixth: I give, devise and bequeath the sum of One Hundred Thousand Dollars ($100,000.00) to Sellar Bullard, as Trustee, to have and to hold the same upon the trusts and for the uses and purposes hereinafter expressed, that is to say:

A. Said Trustee shall be vested with all the rights, powers, privileges, immunities, discretions, and obligations hereinafter enumerated and set forth in Paragraph Eighth hereof.

B. I direct my Trustee to pay the net income from said trust fund in convenient quarterly installments to Bessie Smith Bullard for and during her natural life. Upon the death of said Bessie Smith Bullard I direct my Trustee to pay one-third (1/3) of the income from said trust fund in convenient quarterly installments to each of my granddaughters, Caroline Marie Bullard, Barbara Sellar Bullard, and Clara Jean Bullard, until each shall respectively attain the age of thirty-five (35) years, and as and when each of said granddaughters shall attain the age of thirty-five (35) years, I direct my Trustee to pay over and distribute to said grandchild an equal one-third (1/3) portion of the principal of said trust estate, together with any accumulated and unpaid interest thereon, and thereupon this trust as to that portion so paid shall cease and terminate. It is my intention that the respective interests of my said grandchildren, Caroline Marie Bullard, Barbara Sellar Bullard, and Clara Jean Bullard, shall vest in interest upon my death, and
185 that in the event of the death of any one of them prior to the time such grandchild arrives at the age of thirty-five (35) years, the share of the one so dying shall be distributed immediately, if said Bessie Smith Bullard shall then be deceased, or if living, then immediately after her death.

Seventh: I give, devise, and bequeath the sum of One Hundred Thousand Dollars ($100,000.00) to Sellar Bullard, as Trustee, to have and to hold the same upon the trusts and for the uses and purposes hereinafter expressed, that is to say:

A. Said Trustee shall be vested with all the rights, powers, privileges, immunities, discretions and obligations hereinafter enumerated and set forth in Paragraph Eighth hereof.

B. I direct my Trustee to pay the net income from said trust fund in convenient quarterly installments to Lora Smith Cowan for and during her natural life. Upon the death of said Lora Smith Cowan I direct my Trustee to pay one-half (1/2) of the income from said trust fund in convenient quarterly installments to each of my grandchildren, Kennett Cowan, Jr. and Lora Cowan Ruehrdanz, until each shall attain the age of thirty-five (35) years, and as and when each of said grandchildren shall attain the age of thirty-five (35) years, I direct my Trustee to pay over and distribute to said grandchild one-half of the principal of said trust estate, together with any accumulated and unpaid interest thereon, and thereupon this trust as to that portion so paid shall cease and

terminate. It is my intention that the respective interests of my said grandchildren, Kennett Cowan, Jr. and Lora Cowan Ruehrdanz, shall vest in interest upon my death, and that in the event of the death of either of them prior to
186 the time such grandchild arrives at the age of thirty-five (35) years, the share of the one so dying shall be distributed immediately, if Lora Smith Cowan shall then be deceased, or if living, then immediately after her death.

Eighth: A. I do hereby authorize and direct my said Trustee, hereinabove named in Paragraphs Sixth and Seventh hereof, to take possession of all the estate, real, personal, and mixed, herein appointed, devised, and bequeathed to him, and to invest and reinvest said trust estate in the name of my said Trustee in such bonds, stocks, notes, real estate mortgages, or other securities, or in such property, whether real, personal, or mixed, as my Trustee in his discretion may determine, without being limited by any statute or rule of law regarding investments by trustees. And I do further authorize and empower my said Trustee to manage, care for, improve, protect, control, deal with, and dispose of my said trust estate or any part thereof in his discretion in any and every way in which I could have managed, cared for, improved, protected, controlled, dealt with, and disposed of the same if living; and I do hereby give and grant unto my said Trustee full power and authority to enter into agreements from time to time as he may deem necessary or expedient with reference to the reorganization of corporations whose stock or bonds or other obligations form a part of this trust estate; to improve, manage, protect, and subdivide any and all real estate which may at any time be a part of my said trust estate; to dedicate parks, streets, highways, or alleys, and to vacate any subdivision or part thereof, and to resubdivide said property as often as desired; to contract to sell, to sell said real estate on any terms, at public or private sale or sales for cash or credit or part cash and part credit; to convey either with or without consideration; to donate,
187 to dedicate, to mortgage, pledge, or otherwise encumber; to lease said real estate or any part thereof from time to time by leases to commence in praesenti or in futuro, and upon any terms and for any period or periods of time, ordinary or extraordinary, and to amend, change, or modify leases and the terms and provisions thereof at any time or times hereafter; to partition and repartition and to exchange and reexchange said property or any part thereof for other real or

personal property; to grant easements or charges of any kind; to release, convey, or assign any right, title, or interest in or about said premises; to construct and reconstruct, remodel, alter, repair, add to or take from buildings on said premises, and to deal with said real estate and every part thereof in all other ways and for such other considerations as it would be lawful for any person owning the same to deal with the same, whether similar to or different from the ways above specified, at any time or times hereafter. I further authorize my Trustee from time to time to borrow money and pledge as security for the payment thereof all or any part of the personal estate forming a part of my trust estate.

B. I further authorize my Trustee to cause any security which may at any time constitute a portion of the trust estate to be issued, held, or registered in his own name or in the name of his nominee or in such form that title will pass by delivery.

C. I further authorize my Trustee to determine what is "income" and what is "principal" hereunder, and his decision thereon shall be final; provided, however, that: (1) any interest or dividend received by my Trustee on any security held hereunder which is accrued and unpaid at the
188 time of the delivery of such security to my Trustee shall be considered as income; (2) in the case of securities purchased at a discount the entire subsequent sale price or maturity value shall be credited to principal; (3) in the case of securities purchased at a premium my Trustee shall charge the premium immediately against income without amortizing the same; and (4) any stock dividend or subscription right which may be declared upon or issued in connection with any stock constituting a portion of the trust estate shall be considered as principal and not as income.

D. In no case shall any party to whom said trust estate or any part thereof is conveyed, contracted to be sold, leased, or mortgaged by said Trustee, and in no case shall any party dealing with said Trustee in relation to said trust estate be obliged to see to the application of any purchase money, rent, or money borrowed or advanced on said trust estate, or be obliged to inquire into the necessity or expediency of any act of said Trustee.

E. For convenience in the administration and investment of my said estate, I authorize my said Trustee in his discretion to consider and manage all the property of the estate in his hands as one fund without regard for the several interests

herein provided for the respective beneficiaries, and a separate book account shall be sufficient to show the interest of the respective beneficiaries.

F. I direct my Trustee to collect the income derived from said trust estate, and from such income my Trustee shall first pay all of the necessary costs and expenses of this trust,
including outlays necessary for the protection, manage-
189 ment, and upkeep of said trust estate, repairs, taxes
(general, special, or income), outlays necessary for the insurance, care, and maintenance of said trust estate, and the reasonable compensation of my Trustee.

G. For convenience in making the distribution or divisions of my said trust estate herein directed and provided, I authorize either my Executor, hereinafter named, or my said Trustee, in his discretion, to convert into money all or any part of my said estate, in whatever form the same shall at any time be invested, and for that purpose I hereby authorize and empower my said Executor and also my said Trustee to sell, convey, and dispose of all or any part of my said estate, real or personal, in his discretion, and to execute and deliver all instruments of conveyance and transfer necessary and/or proper; or said Executor or Trustee is hereby authorized in his discretion to make any such distribution or division of my said trust estate in kind in any of the assets in which my said estate may at any time be invested, and the valuations placed upon the various assets of my estate by my Executor or Trustee for the purpose of making any such distribution or division shall be conclusive upon all the beneficiaries under this, my Will, and my said Executor and my said Trustee shall not be responsible to any beneficiary under this, my Will, for any errors made by my said Executor or my said Trustee in the valuation of any such assets.

Ninth: All the rest, residue, and remainder of my estate, real, personal, and mixed, wheresoever situate, of which I may die seized or possessed or to which I may be entitled at
the time of my decease, I give, devise, and bequeath to
190 my said two daughters, Lora Smith Cowan, and Bessie
Smith Bullard, in equal parts, share and share alike.

Tenth: Each and every payment by my Trustee, either of income or principal, to any beneficiary in Paragraphs Sixth and Seventh of this, my Last Will and Testament, provided for shall be paid, transferred, delivered, and conveyed to such beneficiary in person or upon his or her per-

sonal receipt, and not upon any written or verbal order or upon any assignment or transfer by said beneficiary.

Eleventh: I nominate, constitute, and appoint my son-in-law, Sellar Bullard, Executor of this, my Last Will and Testament, and direct that he be not required to give any bond for the faithful discharge of his duties as such executor.

Twelfth: In case of the death, resignation, inability, or refusal to act of Sellar Bullard as Executor and/or Trustee hereunder, then and thereupon my said two daughters, Lora Smith Cowan and Bessie Smith Bullard, jointly, or the survivor of them, shall be and hereby are made successors as Executors and/or Trustees or successor as Executor and/or Trustee hereunder, and such successors or the survivor of them shall thereupon be vested with all the title, rights, powers, privileges, immunities, duties, discretions, and obligations herein conferred upon and vested in the Executor and/or Trustee first named, with the same force and effect as if such successors or the survivor of them had been made the first Executors or Executor and/or Trustees or Trustee hereunder.

If both the said Bessie Smith Bullard and Lora Smith Cowan accept the trusts herein and act as joint successor
191 Trustees, then in case of the death, resignation, refusal, or inability to act of either the said Lora Smith Cowan or Bessie Smith Bullard as successor Trustees hereunder, the survivor of them or the one remaining shall thereupon act as sole successor Trustee of my said trust estate, and shall thereupon be vested with all the title, rights, powers, privileges, immunity, duties, and obligations herein conferred upon and vested in Sellar Bullard as the Trustee first named, with the same force and effect as if said survivor or the one remaining had been made sole Trustee hereunder in the first instance.

In case of the resignation, inability, or refusal to act of the said Lora Smith Cowan and Bessie Smith Bullard or the survivor of them as such successor Trustees or Trustee hereunder, then I hereby empower and authorize the said Bessie Smith Bullard, and Lora Smith Cowan, or the survivor of them to nominate and substitute, by an instrument in writing to be filed in the office of the Recorder of Deeds in the County in which this my Last Will and Testament shall have been filed for probate, any bank or trust company doing business in Lake County or Cook County, Illinois, qualified to accept trusts, as successor Trustee in the place of Lora Smith

Cowan and Bessie Smith Bullard or the survivor of them. Or in the event said Bessie Smith Bullard or Lora Smith Cowan during their joint lives, or the survivor of them during her life, shall fail to nominate and substitute a successor Trustee as hereinabove provided, then I hereby authorize and empower the survivor of said two persons to nominate and substitute, in and by her Last Will and Testament, any bank or trust company doing business in Lake County or Cook County qualified to accept trusts, as such successor trustee in place of said Lora Smith Cowan and Bessie Smith Bullard or the survivor of them, and said corporate successor trustee under either of said methods of nomination and substi-
192 tution shall thereupon be vested with all the title, rights, powers, privileges, immunities, duties, discretions, and obligations herein conferred upon and vested in the Executor and Trustee first named, with the same force and effect as if such successor had been made the first trustee hereunder.

Thirteenth: I hereby direct that all estate, inheritance, and other succession taxes, and all duties and transfer charges and expenses which may be levied upon or incurred in connection with any bequest, legacy, or devise contained in this, my Will, shall be paid out of the corpus of my estate by my Executor or Trustee.

Fourteenth: I hereby revoke all former or other wills and testamentary disposition by me at any time heretofore made.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal this 10th day of September, 1932.

Clara R. Smith (Seal)

The foregoing instrument was subscribed, sealed, published, and declared by Clara R. Smith as and for her Last Will and Testament in our presence and in the presence of each of us, and we at the same time, at her request, in her presence, and in the presence of each other, hereunto subscribe our names and residences as attesting witnesses this 10th day of September, 1932.

Rolland T. R. Hastings residing at 220 Dale Ave. Highland Park, Ill.

Hilma J. Anderson residing at 432 No. Linden Ave.

Samuel S. Holmes residing at 903 N. Sheridan Rd. Highland Park, Ill.

Filed June 1, 1933, John R. Bullock, Probate Clerk.

Proved and Admitted to Record in Open Court, June 22, 1933, Theodore Forby, Acting Probate Judge.

193 Estate of Clara R. Smith, Deceased.

Letters Testamentary.

State of Illinois } ss:
County of Lake }

In Probate Court, June Term, A. D. 1933.

The People of the State of Illinois, to all whom these Presents shall come, Greeting:

Know Ye, That Whereas Clara R. Smith, late of the County of Lake and State of Illinois, died on or about the 24th day of May A. D., 1933, as it is said, after having duly made and published her last Will and Testament, a copy whereof is hereunto annexed, leaving at the time of her death, property which may be lost, destroyed or diminished in value, if speedy care be not taken of the same; and in as much as it appears that Sellar Bullard has been appointed executor in and by the last Will and Testament to execute the same.

Now, to the end that said property may be preserved for those who shall appear to have a legal right or interest therein; and that the said Will may be executed according to the request of the said testatrix, we do hereby authorize the said Sellar Bullard as such executor, to collect and secure all and singular the goods and chattels, rights and credits, which were of the said Clara R. Smith at the time of her decease, in whosoever hands or possession the same may be found; and well and truly to perform and fulfill all such duties as may be enjoined upon him by the said Will so far as there shall be property and the law charge him; and in general to do and perform all other acts which now are or hereafter may be required of him by law.

Witness, John R. Bullock, Clerk of the Probate Court of said County of Lake, and the Seal of said Court, this 22nd day of June A. D. 1933.

JOHN R. BULLOCK
Clerk of the Probate Court.

(Seal)

194 State of Illinois } ss:
County of Lake }

I, John R. Bullock, Clerk of the Probate Court in and for Lake County, Illinois, hereby certify the foregoing to be true and correct copies of the Original Will and Letters Testa-

mentary issued to Sellar Bullard in the estate of Clara R. Smith deceased, now on file and of record in my office, and said Letters are now in full force and effect.

In Witness Whereof I have hereunto subscribed my name and affixed the seal of said Probate Court at my office in Waukegan in said County this 25th day of August A. D. 1933.

JOHN R. BULLOCK
Clerk.

(Seal)

Endorsed: 13225. Lake County Probate Court. Estate of Clara R. Smith Deceased. Letters Testamentary to Sellar Bullard Executor. Filed this 22nd day of June 1933, and Recorded in Executor's Record 4 Page 235. John R. Bullock Clerk.

195-229 * * (EXHIBIT 22. Omitted pursuant to stipulation filed December 22, 1936.) * *

230 PETITIONER'S EXHIBIT 23.

Admitted to Evidence Feb. 13, 1935.

State of Illinois, } ss.
County of Cook. }

IN THE ..... COURT OF COOK COUNTY.

In Chancery.
Clara R. Smith,
Complainant,
vs.
Continental Illinois Bank and Trust Company, as Successor Trustee, *Et Al.,*
Defendants.
No.....

Bill To Revoke and Cancel Voluntary Settlement in Trust and for Accounting, Etc.

To the Honorable Judges of the ..... Court of Cook County, In Chancery Sitting:

Your oratrix, Clara R. Smith, of the City of Highland Park, County of Lake and State of Illinois, brings this her bill of

complaint in her own proper person, and humbly complaining unto your Honors showeth:

(1) That your oratrix is now a woman of seventy-six years of age; that in her early years she married Albert Paul Smith of the City of Chicago, and lived with her said husband in said City until his death in the year 1890; that shortly thereafter she removed to said City of Highland Park
231 with her three children born of said marriage, to-wit, Edward, Lora and Bessie, where she has ever since maintained her home without remarrying.

(2) That her said son, Edward, was in the year 1912 married to Virginia Winslow, and that Edward died on December 16, 1928, leaving said Virginia Winslow Smith, his widow, and leaving no child or children, or descendant of any child or children, surviving him.

(3) That said daughter Lora became intermarried with one Kennett Cowan, from whom she has since been divorced, and is now known as Lora Smith Cowan; that of said marriage two children were born and are now living, to-wit, Kennett Cowan, Jr., and Lora Louise Cowan, who has intermarried with one Alfred Reuhrdanz, Jr., and is now known as Lora Louise Reuhrdanz; that of her said marriage no children have been born; that said Kennett Cowan, Jr., has intermarried with one Elwyn Hewitt, now known as Elwyn Hewitt Cowan, and that of said marriage one child, Paul Charles Cowan, has been born, who is now a minor.

(4) That your oratrix's said daughter Bessie has intermarried with Sellar Bullard, and is now known as Bessie Smith Bullard; that of said marriage three children have been born and are now living, to-wit, Caroline Marie Bullard, born January 7, 1912, Barbara Sellar Bullard, born January 24, 1913, and Clara Jean Bullard, born October 2, 1917.

(5) Your oratrix further shows unto your Honors that as devisee of her said husband and otherwise, your oratrix has for many years last past been possessed of considerable estate and property, the great bulk of which consisted of stocks and bonds and mortgages on real estate, and your oratrix avers that for more than twenty years last past, to-wit, from about the time her said eldest child, Edward, attained
232 his maturity, she relied and depended upon the advice and counsel of her said son, Edward, in respect of the care, control, management, investment, and handling of her said estate; that at about the age of twenty-one, her said son

entered into the employ of William H. Colvin & Company, a brokerage and investment house of established reputation on LaSalle Street in the City of Chicago, with which Company your oratrix's said son remained associated until within a year of the time of his death; that the said William H. Colvin & Company were, during all of said time, members of the Chicago Board of Trade and of the Chicago and New York Stock Exchanges, and as such were generally deemed to be specialists and experts in the matter of financing, investments, etc.; that said William H. Colvin of said Company married your oratrix's sister in the year 1895 and that owing to said relationship between your oratrix's son and the said William H. Colvin and to his association with said Company, and to the training and knowledge which your oratrix believed her said son had acquired and would acquire from said association, and owing to the highly satisfactory results obtained by her son in the handling of her property and the businesslike methods employed by him and the high standard of honesty and integrity which was apparent in all his dealings with her affairs, your oratrix, some twenty years ago, began to and did repose complete confidence in her son's judgment and advice in all matters and to rely implicitly upon his advice and counsel in relation to all her financial and business affairs, permitting him to have unrestricted access to her safety deposit boxes and all her securities, and accepting and acting upon his suggestions and directions as to the handling of her property and securities in all respects, and that from about that time thenceforward to the time of the death of her said son, Edward, he assumed and exercised full authority and power to direct her in all matters having to do with the investment and handling of your oratrix's securities and property; that during all of said times your oratrix's said son, Edward, remained in close contract and association with your oratrix, having lived with her in Highland Park until his marriage in 1912, and thereafter, to-wit: in 1914 and 1915,
233 your oratrix and her said son constructed and lived in houses on adjoining lots in said City; that early in the year 1926 your oratrix suffered an accident, resulting in the breaking of one of her hips; that the shock and injury resulting therefrom caused her to be seriously ill and to be so confined that for several months thereafter she was untable to walk, and that during said period she was even more than previously dependent upon the advice and counsel of her said

son, Edward, in relation to her business affairs; that her said son, during the years in which he had so taken over the affairs of your oratrix, had, by reason of his successful management thereof, progressively earned more and more her faith and confidence to the extent that it had become her habit to accept without question or doubt any statement or advice from him.

(5-a) That in the management of her property your oratrix's son at all times exercised the greatest care to avoid any publicity as to the amount and extent of your oratrix's property and estate, and sought in every way to avoid any facts as to kind or character of her securities or the value of her estate becoming known to anyone outside the immediate members of your oratrix's family.

(6) That it had been the habit of your oratrix to spend her winters at Santa Barbara, California, but that owing to her said accident and confinement, she remained in Highland Park during the winter of 1926-27, and that during the month of January, 1927, her said son, Edward, suggested to her that it would be advisable that she assign and transfer to him, as trustee, a large portion of her estate under a written trust agreement; that he advised her of certain supposed advantages of such an arrangement, towit: that in the event of her death that part of her property represented by the securities disposed of through the medium of such trust would not be inventoried in the probating of her estate or become a matter of public record; that it would save the payment of heavy State inheritance and Federal Estate taxes, would save
234 cost of administering through probate the property disposed of through the medium of such trust, and that it would not place her at any disadvantage during her lifetime for the reason that such written trust instrument would be so drawn and contain such provisions that she would retain and continue to have entire control over such fund during her lifetime and have reserved to her thereunder full power to revoke and terminate said agreement at her own free will; that your oratrix, fully relying upon the said statements of her son, acquiesced in such advice and suggestion, and that thereupon her said son prepared and drafted, or caused to be prepared and drafted by his attorneys acting solely upon his instructions and with whom your oratrix had no discussion or correspondence at any time relative thereto, a certain trust agreement, which was thereafter on, to-wit, March 3, 1927,

duly executed by your oratrix, and is in words and figures as follows, to-wit:

235 "This Agreement, Made this 3rd day of March, A. D. 1927, between Clara R. Smith of the City of Highland Park, County of Lake and State of Illinois (hereinafter for convenience referred to as 'Depositor'), and Edward A. Smith, son of Depositor, also of the City of Highland Park, County of Lake and State of Illinois (hereinafter for convenience referred to as 'Trustee') Witnesseth:

"First: That the Depositor for and in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations to her in hand paid by the Trustee, the receipt whereof is hereby acknowledged, does hereby and by these presents, grant, bargain, sell, convey, assign, set over, release, quit-claim and deliver unto the Trustee all and singular, the property whether the same be real, personal or mixed, in and to:

130 shares of International Harvester Company Common Stock,
75 shares of National Biscuit Company Preferred Stock,
100 shares of Great Northern Railway Company Preferred Stock,
1824 shares of American Can Company Preferred Stock,
700 shares of Union Pacific Railroad Company Common Stock,
200 shares of American Multigraph Company Stock,
100 shares of Firestone Tire and Rubber Company Common Stock,

"To have and to hold the same unto the said Trustee for the following uses and purposes, namely:

"The Trustee shall take possession of all of said property, whether real, personal or mixed, and hold, manage, care for, control, invest, and re-invest said trust estate in the name of the Trustee in any real, personal or mixed property, which to the Trustee shall seem advisable, including bonds, stocks, mortgages, notes, securities, real estate and/or any other property, whether real, personal or mixed, which to the Trustee may seem best, with power to vary the investment or investments of said trust estate for any other or others of the character above specified in the discretion of said Trustee, and said Trustee is further authorized and empowered to manage, care for, improve, protect, insure, control, deal with and dispose of said trust estate or any part thereof in his discretion, in any and every way in which an owner thereof

could manage, care for, improve, protect, insure, control, deal with and dispose of the same. The Trustee shall have full power as to any real estate which may be held by him to lease or demise the same from time to time, or any part or parts thereof with the improvements thereon or to be erected thereon, for any period or periods not exceeding, however, the period of 198 years; and the said Trustee shall have full power to contract to sell, to sell on any terms, to convey with or without consideration, to mortgage, pledge or otherwise encumber such trust property with the improvements thereon or to be erected thereon, to partition or to exchange said premises, or any part or parts thereof, for other real or
236 personal property, incumbered or unincumbered, and to re-partition or re-exchange such property, or any part or parts thereof as often as desired, and to sell, contract to sell, lease, by lease to commence in praesenti or in futuro, and sublease, assign, mortgage, pledge, dispose of, convert and reconvert, and in general to deal with such property, or any part or parts thereof, whenever and howsoever, and as often as desired, to grant easements or charges of any kind, to make contracts or agreements for party walls or in relation thereto or for building or building restrictions or in relation thereto or otherwise, to release, convey or assign any right, title or interest in or about said premises or any part or parts thereof, to give consent on behalf of said premises, or any part or parts thereof, to any use of the streets, alleys, parks, or public places, for railroads, street railroads, gas or electric light poles, lines, pipes, conduits or other equipment or other public, or semi-public improvement or use, to erect, repair, remodel and reconstruct buildings, improvements, etc., upon said premises, or any part or parts thereof, to construct sidewalks and to grade, fill, curb and pave streets, and alleys, to lay and maintain sewer, water and gas pipes, etc., and do all other work and make all other improvements in streets and alleys as said Trustee may desire, all by private contract, and also to petition any property constituted municipal corporation for the construction of any sidewalk, or for any street or other public or semi-public improvement or use. Said Trustee shall also have full right and power to grant any and all rights and to lease, sublease, sell, assign and otherwise dispose of any right, title or interest concerning or in relation to sub-sidewalk spaces or concerning or in relation to any part of the streets and alleys adjacent to their trust property, and to deal with said premises and every part

thereof in all other ways and for such other considerations as it would be lawful for any person owning the same to deal with the same, whether similar to or different from the ways above specified at any time or times hereafter. All of the foregoing recitals of the powers of the Trustee are inclusive and not restrictive.

"Said Trustee shall have no responsibility as to the validity or value of, nor shall he be liable for any loss arising from any investments made with the written approval of the Depositor or in accordance with the provisions hereof. Neither shall said Trustee or his successor or successors be personally liable in any matter or in general hereunder unless they shall be guilty of malfeasance or willful negligence in the premises herein.

"Second: The Depositor may from time to time in her discretion add to said trust estate, and include therein, any additional property, real, personal or mixed, such additional property to be described in a schedule or schedules and
237 attached hereto, entitled 'Schedule of property of the Clara R. Smith Trust' which said schedule or schedules shall bear the signature of the Depositor.

"The schedule or schedules so attached to this agreement, and the property therein described, shall be made a part hereof with the same force and effect as if such property were described in detail herein, and included as a part of the property set forth under property described in paragraph 'First' and shall be held by said Trustee in Trust, under the same terms and conditions as though such addition or additions to said trust property were deposited by the Depositor as part of the original deposit made hereunder.

"Third: Out of the income derived from the property belonging to said trust estate (whether such income be from rents, interest or otherwise), said Trustee shall first pay all the necessary costs and expenses of the Trustee and of this trust. He shall also make all payments of principal, interest or other sums falling due on any personal property or real estate owned or purchased by said trust estate at any time, or in which the trust estate is interested, and shall pay any other sums which the Trustee may deem necessary for the best interests of said trust estate. Said Trustee shall from time to time set aside from such income such sum or sums as he may deem advisable for the purpose of paying in full or in part any mortgage on said trust estate, or of any part thereof and for the purpose of establishing a reserve for

depreciation of buildings which may form a part of said trust estate at any time. Pending the application of the funds, so reserved, to the payment or reduction of a mortgage or mortgages of, or to the restoration or rebuilding of buildings on real estate forming a part of the trust estate, such funds may be invested and reinvested in like manner as other funds of the trust estate and the income arising therefrom shall be subject to all of the provisions hereof with reference to income from said trust estate. The principal of such reserve funds shall be applied from time to time by said trustee to the payment or reduction of mortgages of real estate or to the payment or reduction of mortgages of leasehold interests in real estate forming a part of the trust estate or to the restoration or rebuilding of buildings thereon or erected thereon. In case any part of such reserve funds remains unexpended at the termination of this trust it shall be distributed in the same manner as if it were a part of the corpus of the trust estate. Said Trustee shall also have the right to set aside from time to time such an amount or amounts as he may deem necessary for the proper handling and protection of the Trust Estate, and the balance of the income which shall hereafter be designated as 'net income' shall during the life time of the Depositor be paid to her as the same is received by said Trustee.

238 "Fourth: In the event that the income derived from this trust and herein provided to be paid to the Depositor should be insufficient at any time to maintain the Depositor in the manner in which she is accustomed to live at the time of the erection of this agreement, then the Trustee shall have full right and power to pay to the said Depositor from time to time, as he shall see fit such part of the principal of this trust estate as may in his opinion be necessary to so maintain her as she was accustomed to live at the time of the execution of this agreement. Said Trustee shall also have the right to and with the consent of the Depositor to make partial distribution of principal from time to time to either or any of the Depositor's children or others named as beneficiaries hereunder in such amounts as the Depositor and said Trustee may see fit.

"Fifth: Upon the death of the Depositor or as soon thereafter as is practicable, said Trustee shall first set aside in property or securities the sum of Three Hundred Thousand ($300,000.00) Dollars which sum shall be divided into three equal parts, and thereafter said Trustee shall hold such

shares in three separate and distinct trusts; one of said shares for Depositor's daughter, Lora Smith Cowan, as hereinafter provided; one of said shares for Depositor's daughter, Bessie Smith Bullard, as hereinafter provided; and one of said shares for Depositor's son, Edward A. Smith, as hereinafter provided, administering the said three trusts and disposing of the three respective trust estates in severalty, separate and distinct from each other in manner following, to-wit:

"Said Trustee shall pay the net income from each of said shares to the respective child for whom said trust is set aside for and during the lifetime of such child. Such income to be paid to such child either monthly, quarterly, or semi-annually as said Trustee may elect and as shall be for the best interests of this trust (the wish of the Depositor but not her direction being that such income be paid quarterly).

"Upon the death of Depositor's daughter, Lora Smith Cowan, then the income from said sum so set aside for her shall be paid to her children share and share alike until the youngest of her present children attains the age of twenty-six years, or if deceased, then when such child if living would have arrived at said age at which time the principal of said trust estate shall be divided among the children of Depositor's said daughter share and share alike. It being the intention that in the event that all of the children of Depositor's said daughter have arrived at the age of twenty-six years prior to her decease that then distribution of said principal shall be made immediately after her decease. In the event of the death of any of her said children prior to the time of

239 the distribution of the said principal sum hereunder, then the income shall be paid to the heirs-at-law of such deceased child or children according to the present laws of descent of the State of Illinois until time for the final distribution of said sum whereupon said principal sum shall likewise be paid to said heirs-at-law of such deceased child or children.

"Upon the death of Depositor's daughter, Bessie Smith Bullard, then the income from said sum so set aside for her shall be paid to her children share and share alike until the youngest of her present children attains the age of twenty-six years, or if deceased, then when such child if living would have arrived at said age at which time the principal of said trust estate shall be divided among the children of Deposi-

tor's said daughter share and share alike. It being the intention that in the event that all of the children of Depositor's said daughter have arrived at the age of twenty-six years prior to her decease that then distribution of said principal shall be made immediately after her decease. In the event of the death of any of her said children prior to the time of the distribution of the said principal sum hereunder, then the income shall be paid to the heirs-at-law of such deceased child or children according to the present laws of descent of the State of Illinois, until time for the final distribution of said sum whereupon said principal sum shall likewise be paid to said heirs-at-law of such deceased child or children.

"Upon the death of Depositor's son, Edward A. Smith, then the income from said sum so set aside for him shall be paid to his widow for and during her natural life unless he shall leave him a child or children surviving in which event said income shall be paid to such child or children until said youngest child arrives at the age of twenty years at which time the principal of said trust estate shall be divided among the children of Depositor's said son share and share alike. It being the intention that in the event that all of the children of Depositor's said son have arrived at the age of twenty years prior to his decease, that then distribution of said principal shall be made immediately after his decease. In the event of the death of any of his said children prior to the time of the distribution of the said principal sum hereunder, then the income shall be paid to the heirs-at-law of such deceased child or children according to the present laws of descent of the State of Illinois until time for the final distribution of said sum whereupon said principal sum shall likewise be paid to such heirs-at-law of such deceased child or children. In the event Depositor's said son shall leave him no child or children surviving, then the principal of said trust estate shall upon the death of both himself and his widow be paid one-half to the children of Depositor's daughter, Lora
240 Smith Cowan, and one-half to the children of Depositor's daughter, Bessie Smith Bullard, the heirs-at-law of any deceased child to receive the part such deceased child would have received if living.

"The remainder of said principal after the setting aside of said Three Hundred Thousand ($300,000.00) Dollars shall, upon the said death of the Depositor be divided into three equal parts as nearly as is practicable or possible, quality

and quantity considered, so that when said division is completed, each of said three shares shall be as nearly as is practicable of the same fair cash market value deducting, however, any payment on account of principal theretofore made (if any) to any of Depositor's child or children from such child or children's share, one of said parts shall be paid to each of said children of the Depositor, if living, and in the event of the death of any of said children prior thereto, then the share which such deceased child would have received, if living, shall be added to the principal of and become a part of the One Hundred Thousand ($100,000.00) Dollar trust herein created for such child so deceased.

"Sixth: The Trustee reserves unto himself, the right to resign from this trust at any time upon giving five days' written notice of said resignation to the beneficiaries hereunder. In case of said resignation or in case of the death or other inability to act at any time of the said Trustee, then the Illinois Merchants Trust Company with its principal office in the City of Chicago and State of Illinois, shall act in his place and stead, and in the event of the resignation, removal, failure or refusal or inability of the said Illinois Merchants Trust Company to act, then a new Trustee shall be appointed in its place and stead, which said new trustee shall be appointed by a Court in Chancery in Cook County, Illinois, after notice to all parties in interest as is now provided for serving notice in chancery.

"Seventh: For the purpose of making distribution, the Trustee or his successor is authorized and empowered to value and appraise any and all of said trust estate and to distribute the same in kind or in cash, as he, or it, may deem advisable, and any such valuation or appraisement, so made shall be valid and binding upon each and every beneficiary hereunder.

"Eighth: All estate, inheritance and other taxes, and all deeds of transfer, charges, and acceptances, if any, which may be levied or incurred in and in connection with any payments or gifts under this agreement, shall be paid by the Trustee out of the corpus or unexpended net income of the trust estate subject to this agreement.

241 "Ninth: In the event the Trustee shall be made a party to any litigation on account of the trust or the trust estate hereby created, such Trustee shall have a lien on such trust estate for all costs and expenses, including reason-

able compensation and reasonable attorney's fees, and shall be reimbursed from said trust estate therefor.

"Tenth: Any present or future Trustee, or beneficiary may contract with the Trustee on the same basis as any other person.

"Eleventh: No purchaser at any sale made by the Trustee under this indenture, shall be obliged to see to the application of the purchase money.

"Twelfth: No part of the trust estate shall become vested until such time as the beneficiary or beneficiaries hereunder shall become entitled to the actual possession thereof; payment of income and principal provided for herein shall be made to the respective beneficiaries in person (except payments made to or for the benefit of minors) and then only upon their respective receipts and shall not be grantable, transferrable, or otherwise assignable in whole or in part by the voluntary or involuntary acts of the respective beneficiaries or by operation of law and shall not be liable for any obligation of the respective beneficiaries.

"In Witness Whereof, the Depositor has hereunto set her hand and seal, and the Trustee has likewise hereunto set his hand and seal, all the day and year first above written.

"Clara R. Smith (Seal)
Depositor.
"Edward A. Smith (Seal)
Trustee."

"State of Illinois, }
"County of Lake. } ss.

"I, Raymond L. Erskine, a Notary Public in and for said County in the State aforesaid, Do Hereby Certify that Clara R. Smith personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed and delivered the said instrument as her free and voluntary act, for the uses and purposes therein set forth.

"Given under my hand and notarial seal, this 3d day of March, A. D. 1927.

"Raymond L. Erskine,
Notary Public."

242 that immediately after the execution of said trust agreement and pursuant thereto, the securities described there-

in were taken by your oratrix's son from her safety deposit box and transferred from your oratrix's name into the name of your oratrix's son as Trustee, and thereafter until his death remained in his name as such Trustee and in his possession, and that said securities had on the date of the execution of said trust agreement a market value of, to-wit: $400,000.00.

(7) Your oratrix further shows unto your Honors that between the time her said son first proposed to her the creation of a trust and the time of its execution, as aforesaid, your oratrix had several discussions at her home with her said son relative thereto, on which occasions the various provisions contained in said instrument for the ultimate disposition of said trust fund at the time of her death were discussed and finally decided upon; that your oratrix believes that on certain of said occasion Edward had with him a preliminary draft or drafts of said proposed agreement, but your oratrix says that she did not at any such times nor at any time concern herself beyond making known to him what her wishes were as to such final disposition of said fund, but that on the contrary, she relied entirely upon the assurances previously given her by her said son to the effect that said proposed trust agreement would be so drawn and contain such provisions that the arrangement could be terminated by her at any time during her life; and that she could withdraw said fund therefrom in whole or in part according to her wishes, and that after deciding and directing him regarding her wishes as to ultimate disposition of said fund at the time of her death, she left entirely to him the matter of drawing or causing to be drawn such an instrument as would effect her purposes in that respect and at the same time preserve to her the right to withdraw said fund in whole or in part from said trust arrangement and to revoke and terminate the
243 same; that during all of the period in which said proposed trust was being formulated, your oratrix was in poor physical condition as a result of her said accident and was not disposed to the careful reading of any lengthy legal document; that she reposed, as hereinbefore set forth, complete confidence in the integrity of her said son, and that she believed him, by reason of his associations and training and the successful management of her affairs as aforesaid, to be more capable than herself to understand and interpret said trust instrument and to see to it that as finally drawn and executed the same should express such wishes as she had so

communicated to him and should reserve to her such rights and privileges as he had advised her would be retained and reserved; that your oratrix now believes and so alleges the fact to be that her son at all times understood and believed that said trust instrument as finally drawn fully expressed such wishes as your oratrix had communicated to him and that said instrument contained express provisions reserving to her such rights and privileges as he had advised her would be retained and reserved to her, and particularly that said trust instrument contained all necessary provisions for the reservation to her of the right to withdraw said fund or any part thereof from said trust at any time she might wish and/or to revoke, terminate, or modify the same at any time in whole or in part; that said trust instrument as finally executed was left with her at her home by her said son on or about March 3, 1927, at which time she was engrossed in preparation for her departure to Santa Barbara, California, on March 3d, and that for the reasons aforesaid, your oratrix never read over said instrument hereinbefore set forth, but executed the same on the said day of her departure for California, fully believing that the same expressed and would effect her donative purposes communicated by her to her said son and that it contained all necessary provisions for the reservation to her of the right to withdraw said fund, or any part thereof, from said trust at any time she might wish and/or to revoke, terminate, or modify the same at any time in whole or in part.

244 (8) That after the execution of said trust agreement, said Edward A. Smith continued to act as trustee thereunder until the time of his death, to-wit, December 16, 1928, and also continued as theretofore to manage the affairs of your oratrix generally; that during his lifetime, there was no occasion for your oratrix to exercise or attempt to exercise any right or power under said trust instrument, and that no question arose during said time as to the construction, validity or effect of any provisions thereof; that the Illinois Merchants Trust Company, named as successor trustee under said trust instrument, became, subsequent to the date thereof, merged or consolidated with a certain other corporation or corporations having trust powers, and that the corporation resulting from such merger or consolidation is known as Continental Illinois Bank & Trust Company, and has succeeded to all rights, privileges, powers and trusts resident in said Illinois Merchants Trust Company, including said right

as successor trustee under said trust instrument, and that said Continental Illinois Bank & Trust Company has accepted said trust and is now and for sometime past has been acting as trustee under the aforesaid trust agreement.

(9) That your oratrix recently communicated to said Continental Illinois Bank & Trust Company, trustee, her desire to revoke and terminate in all respects the said trust; and that your oratrix was thereupon advised by said trustee that said trust instrument contains no provision or provisions which in the opinion of said trustee would have the legal effect of reserving any such right or power to your
245 oratrix, and that in the absence of such provision, said trustee considered it to be its duty to retain and administer said trust; that your oratrix thereupon sought the advice and aid of counsel, which counsel, after examining and construing said trust instrument, have advised your oratrix that the said trust instrument as drawn and executed fails to reserve to your oratrix the right to revoke and terminate said trust, and that she is entitled under the provisions thereof to withdraw or draw upon the principal of said trust fund only in the events and upon the conditions set forth in Paragraph Fourth of said trust instrument, and then only in such amounts and to such extent as the trustee may in its untrammeled discretion approve.

(10) Your oratrix further alleges and shows unto your Honors that it was her intention and desire that said trust instrument should contain provisions reserving to her during her lifetime the right and power to withdraw therefrom said fund or any part thereof and/or to modify or revoke and terminate said trust agreement in whole or in part at her own free will; that said instrument was executed by her under the mistaken belief and upon the representations of her said son and relied upon by her that as a matter of fact the said instrument would and did contain such provisions, and that she would not have signed or delivered the same had she known the fact to be otherwise.

(11) That your oratrix has been further advised by her said counsel, and so alleges the fact to be, that certain of the provisions of said trust instrument designed to control and effect the disposition of income and principal of the portion of said trust fund set aside for your oratrix's son, Edward A. Smith, to-wit, One Hundred Thousand Dollars ($100,-
246 000.00) plus such further sum as might come to said share by reason of Edward A. Smith's predeceasing your

oratrix, are invalid, inoperative, void and ineffective because violative of the Rule against Perpetuities; that the said void and inoperative provisions of said trust instrument are as follows:

"Upon the death of Depositor's son, Edward A. Smith, then the income from said sum so set aside for him shall be paid to his widow for and during her natural life unless he shall leave him a child or children surviving in which event said income shall be paid to such child or children until said youngest child arrives at the age of twenty years at which time the principal of said trust estate shall be divided among the children of Depositor's said son share and share alike. It being the intention that in the event that all of the children of Depositor's said son have arrived at the age of twenty years prior to his decease, that then distribution of said principal shall be made immediately after his decease. In the event of the death of any of his said children prior to the time of the distribution of the said principal sum hereunder, then the income shall be paid to the heirs-at-law of such deceased child or children according to the present laws of descent of the State of Illinois until time for the final distribution of said sum whereupon said principal sum shall likewise be paid to such heirs-at-law of such deceased child or children. In the event Depositor's said son shall leave him no child or children surviving, then the principal of said trust estate shall upon the death of both himself and his widow be paid one-half to the children of Depositor's daughter, Lora Smith Cowan, and one-half to the children of Depositor's daughter, Bessie Smith Bullard, the heirs-at-law of any deceased child to receive the part such deceased child would have received if living."

and that by virtue of the provisions contained in the paragraph immediately following said void and inoperative provisions of said trust instrument, the said Edward A. Smith having predeceased your oratrix, one-third of the value in excess of Three Hundred Thousand Dollars ($300,000.00) of said whole trust fund at the time of your oratrix's death would be likewise affected by said void and inoperative provisions, so that said trust instrument wholly fails to effect any valid disposition of a full one-third of the whole amount of said trust fund.

247 (12) That your oratrix is advised by her said counsel, and so alleges the fact to be, that said provisions last above quoted for the disposition of the share of Edward A.

Smith under said trust violate said Rule against Perpetuities in this: That the corpus of said share is so limited as to remain contingent and unvested until after the expiration of the life of said Edward A. Smith and the expiration of the life of any person whom he might leave surviving him as his widow; that it was possible that said Edward A. Smith might survive your oratrix and marry a woman not in being at the time of the execution of said trust instrument or at the time of the death of your oratrix, and who might survive him and all other persons named in said instrument for a period of more than twenty-one years, and consequently that said corpus might not vest in any person for a longer period than a life or lives in being and twenty-one years, as said Rule requires.

(13) Your oratrix further alleges and shows unto your Honors that had she known or been advised that said trust instrument, by reason of said violation of said Rule against Perpetuities, was wholly inoperative and ineffective as to one-third of said trust fund, she would not have signed and delivered the same; that your oratrix conceived and intended the disposition of the whole of said trust fund as one single and connected distributive scheme, and would not have created said trust or have provided for the payment of either income or principal of any part of said fund to any other beneficiary named in said instrument if she had known or been advised that the provisions therein for distribution
248 to the children of her son Edward surviving him were void, or that the further provisions for the distribution of the shares designed for such children, effective in the event he should leave no child surviving him, were void.

(14) Your oratrix further shows unto your Honors that the persons hereinbefore named, and who are hereinafter named as defendants to this your oratrix's bill of complaint, are the only persons now in being who by any contingency or possibility whatever now have or may claim any right, title or interest, beneficial or otherwise, in or to the trust fund established and held under said trust agreement aforesaid, and that the persons so named as defendants represent in equity all and singular persons who may hereafter be born and who might under any contingency become entitled to any estate, right, title or interest in or to said trust fund.

Forasmuch, Therefore, as your oratrix is without remedy except in a court of equity where such matters are properly cognizable and relievable, and to the end that said Continental

Illinois Bank & Trust Company, as successor trustee, Virginia Winslow Smith, Lora Smith Cowan, Kennett Cowan, Jr., Elwyn Hewitt Cowan, Paul Charles Cowan, a minor, Lora Louise Reuhrdanz, Alfred Reuhrdanz, Jr., Bessie Smith Bullard, Sellar Bullard, Caroline Marie Bullard, Barbara Sellar Bullard and Clara Jean Bullard, a minor, who are hereby made parties defendant to this bill of complaint, may be required to make full and direct answer to the same, but not under oath, the answers of said defendants under oath being hereby expressly waived; that a guardian ad litem may be appointed for said minor defendants, Paul Charles Cowan and Clara Jean Bullard, to defend the interests of said minor defendants in this suit, and that by the final decree of
249 this Court entered herein it may be found, ordered, adjudged and decreed that the parties to this cause represent in equity all the persons now in being or who may hereafter be born who are or may hereafter under any contingency become entitled to any estate, right, title or interest in or to the trust fund held under the trust agreement hereinbefore described, and that such decree will bind and conclude all and singular such person and persons and their respective estates and interests claimed by, through or under said trust agreement; that this Honorable Court will construe and interpret the terms and provisions of said trust agreement, and will ascertain, find and declare particularly that the provisions thereof which are last hereinabove set forth, providing for the distribution of corpus of the share set apart under said instrument for Edward A. Smith to his children surviving him, and providing further for the gift over of said corpus in the event said Edward A. Smith should leave no children surviving him, are void, inoperative and ineffective because in violation of the Rule against Perpetuities, and will by its said final decree adjudge and declare that the dispositive provisions of said trust instrument present and were intended by your oratrix as a single, connected and inseparable scheme, and that by reason of the ineffectiveness of said provisions disposing of the corpus of said share so set aside for said Edward A. Smith, the whole of said scheme and trust arrangement is destroyed and rendered void, and that the Court may in and by its said final decree find, order, adjudge and declare that by reason of all of the matters set forth in
250 your oratrix's bill of complaint the trust agreement therein described is revocable at the will of your oratrix, and may adjudge and declare the same to be revoked and

terminated in toto, and may order, decree and direct the said defendant, Continental Illinois Bank & Trust Company, trustee, to account for and assign, transfer and set over to your oratrix all of the assets and property held by said defendant in said trust, and that your oratrix shall thereupon hold and possess the same as her own absolute property, free and clear of any trust declared in said trust agreement, and free and clear of any right, claim or demand of the defendants or any person claiming by, through or under the provisions of said trust agreement, and will grant unto your oratrix such other and further relief in the premises as the nature of her case may require and as to this Court may seem agreeable to equity and good conscience.

May It Please Your Honors to grant unto your oratrix the People's writ in chancery issued out of and under the seal of this Honorable Court, directed to the Sheriff of Cook County, aforesaid, commanding him that he summon all and singular the defendants hereinbefore named to be and appear before this Honorable Court on the first day of the ..... A. D. 1931 Term thereof, then and there to answer all and singular the premises, but not under oath, as herein provided, and to stand to, abide by and perform such orders and decrees as may be entered herein.

And your oratrix will ever pray, etc.

.....

Complainant.

.....

Solicitors for Complainant.

Filed Apr. 3, 1936.

21 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—77764) * *

Promulgated April 3, 1936.

Decedent in 1927 created a trust irrevocable on its face, retaining the right to the income for life. Subsequently question as to the validity of the trust arose and an oral family agreement was arrived at to terminate the trust by court order as violative of the rule against perpetuities, decedent to execute a new trust. Pursuant to the agreement, on February 27, 1932, the court order was entered finding and decreeing the old trust void, declaring that decedent was the absolute owner, free and clear of the trust or any one claiming

under it, of all the property involved, and ordering the transfer back to the decedent of all such property. A new trust, bearing date of February 17, 1932, had been executed which, by the terms of the agreement, became effective on the entry of the decree. Decedent, by letter of February 17, 1932, had ordered the old trustee to transfer the property direct to the new trustee and this was done. Under the new trust decedent retained the income for life. *Held*, that the property covered by the new trust should be included in the taxable estate under the provisions of section 302 (c) of the Revenue Act of 1926, as amended.

Samuel S. Holmes, Esq., Lorentz B. Knouff, Esq., and Harry Thom, Esq., for the petitioner.

Harford Allen, Esq., for the respondent.

OPINION.

VAN FOSSAN: This proceeding was brought to redetermine a deficiency in the estate tax of the estate of Clara R. Smith, deceased, in the sum of $17,271.46.

The petitioner alleges that the respondent erred in including in the gross estate of Clara R. Smith the corpus of a trust created on February 17, 1932, consisting of securities having an aggregate value of $112,148.75.

The decedent, Clara R. Smith, was born in 1856. She married Albert Paul Smith, who died in 1890. Four children were born to the decedent and her husband: Edward A., Lora, Bessie, and a child who died in infancy. Edward A. Smith married Virginia Winslow in 1912 and died on December 16, 1928, leaving his widow surviving him. No children were born to them.

Lora Smith married Kennett Cowan, was divorced from him about 1915, and has two children: Kennett Cowan, Jr., who was about 27 years of age in 1931, and Lora Louise, who was about 24½ years of age in that year and was married to Alfred Ruehrdantz, Jr. Kennett Cowan, Jr., married Elwyn Hewett. They have one minor son. Lora Ruehrdantz and her husband have no children.

Bessie Smith married Sellar Bullard. Three children were born to them: Caroline Marie, Barbara Sellar, and Clara Jean, now about 23, 22, and 17 years of age, respectively.

Clara R. Smith died testate on May 24, 1933, leaving a gross estate of over $650,000. Two of her sisters had been

married to officials of the American Can Co. One sister gave to the decedent a large number of shares of the preferred stock of that company. Decedent thereafter (and prior to 1927) made direct gifts of approximately 1,000 shares of that stock to her three children.

On March 3, 1927, the decedent established a trust, irrevocable on its face. By it she transferred to her son, as trustee, with the Illinois Merchants Trust Co. as successor trustee, certain shares, common and preferred, in the American Can Co., the International Harvester Co., and five other well known corporations. The largest block was 1,824 shares of American Can Co. preferred stock. The trust agreement granted to the trustee broad powers of management and complete and exclusive authority and discretion to invest and reinvest the corpus of the estate.

The trust provided that the net income from the trust estate should be paid to the trustor during her lifetime and upon her death the trustee should set aside the sum of $300,000 in property or securities in three separate trusts of $100,000 each, the income from which should be paid to the trustor's three children during their lifetime. After the respective deaths of the two daughters the income from their trusts was to be paid to their respective children until the youngest living at the time the trust was established should attain the age of 26 years or, if deceased, then when such child, if living, would have arrived at that age, at which time the principal of each trust was to be divided equally among the children entitled thereto.

Upon the death of Edward A. Smith, decedent's son, the income from the corpus so set aside for him was to be paid to his widow during her lifetime unless a child or children survived him. In that event the income was to be paid to such child or children until the youngest became 20 years old, when the corpus was to be divided equally among such children.
23 If any of Edward A. Smith's children should die before the distribution of the corpus then the income was to be paid to the heirs at law until the time set for final distribution. If Edward A. Smith died leaving no child surviving, the corpus was to be paid to the children of his sisters, subject to the intervening life estate of his widow, Virginia Smith.

The corpus remaining after establishing the three $100,000 trust funds was to be divided into three equal parts upon the death of the trustor and to be paid to her three children, if living, but if any be deceased, the share of such deceased child

was to be added to the $100,000 trust fund created for that child.

The decedent's son Edward acted as her business manager and adviser. She relied on his judgment, suggestions, and advice. He died without issue on December 16, 1928. After his death Sellar Bullard, the decedent's son-in-law, acted in the same capacity as adviser. The decedent depended upon him and gave him her confidence. After Edward A. Smith's death the Illinois Merchants Trust Co. became the successor trustee and upon its merger with the Continental Illinois Bank & Trust Co. the latter became the successor trustee.

In August 1929 the decedent executed a will giving certain pecuniary bequests aggregating $63,000 to persons outside the immediate family and devised and bequeathed one-half of the remainder of her estate to Bessie Smith Bullard, absolutely, and the other half thereof to the Chicago Title & Trust Co. and Sellar Bullard, as trustees, with broad powers of management, to pay the net income therefrom to Lora Smith Cowan for her life and the remainder to her children when the youngest should become 25 years old.

In 1931 the decedent became dissatisfied with the trust created by her on March 3, 1927, because the trustee insisted that a part of the 1,824 shares of American Can preferred stock held in this trust be sold or exchanged for other securities in order to effect a greater diversification of investment. Due largely to her relationship to certain officers of the American Can Co., the decedent preferred to trust to the safety of the preferred stock of that corporation and to receive a higher income therefrom rather than to trust to the ability and judgment of the trustee to select the investments comprising the corpus of the trust. The daughters agreed with the decedent, and believed that if the trustee did not sell the stock before the decedent's death, it would do so thereafter.

At the time of the execution of the trust of March 3, 1927, the decedent's son told her that the trust was revocable and that she could do what she pleased with the trust funds and securities. However, some time after her son's death she was advised by her attorney and her son-in-law, Sellar Bul-
24 lard, that the trust was irrevocable and that, if possible, it should be terminated and a new trust executed. Her attorney also advised her that a friendly dissolution of the old trust could be made if all adult parties in interest would join in the court action which would be necessary, due to the

interests of minors as future beneficiaries of the trust. Various family conferences were held and the decedent decided that the proper procedure was to recall into her control the greater part of the preferred shares of the American Can Co. which had formed a part of the corpus of the old trust and thereafter make a new trust.

Virginia Smith, widow of the decedent's son, Edward A. Smith, refused to consent to the cancellation and termination of the old trust. Thereupon the decedent instructed her attorney to prepare a bill praying that the trust be declared void on the ground of misrepresentation and fraud on the part of her son. Such a bill was prepared and presented to the decedent and her two daughters for approval. The daughters became alarmed because Virginia Smith would oppose any such action and the family discord would become public. The bill was never filed. The decedent's attorney suggested that a decree declaring the trust void on the ground that certain of its provisions violated the rule against perpetuities, might be entered. Such a bill was filed, but Virginia Smith denied that the trust was invalid and refused to consent to the entry of any decree declaring it so. Later, however, she agreed to consent to the entering of such a decree on the sole condition that her rights and interests should be preserved exactly as they were set forth in the trust of March 3, 1927.

Thereupon, for the purpose of avoiding a family quarrel and preventing unpleasant litigation with its consequent undesirable notoriety, an oral family agreement was entered into. This agreement provided that upon the entering of the decree terminating the old trust a new trust would be created and become operative. The corpus of that trust would be the portion of the securities representing Virginia Smith's life estate created by the old trust. It was also agreed that the new trust would grant to her the identical interest which she possessed under the old one. The income was to be payable to decedent for life. The agreement further provided that the decedent would execute a new will bequeathing enlarged interests to the minor beneficiaries and making adequate provision for the adult beneficiaries. Virginia Smith further stipulated that the proposed new trust should be executed prior to the entry of the decree dissolving the old trust.

Pursuant to that agreement the new trust was executed on February 17, 1932. A new will was prepared eliminating
25 $53,000 from gifts to persons other than the immediate family, bequeathing certain definite sums to the de-

cedent's grandchildren, establishing two $100,000 trusts for the benefit of her daughters for life, with remainders to their respective children, and bequeathing the residue of her estate to her two daughters equally.

On February 17, 1932, the decedent sent the following letter to the Continental Illinois Bank & Trust Co., the trustee under both the old and the new trusts:

> As you are aware, I have filed my bill in the Superior Court of Cook County to cancel a voluntary settlement in trust and for an accounting, in a certain cause entitled *Clara R. Smith, Complainant,* vs. *Continental Illinois Bank and Trust Company, as Successor Trustee, et al,* General No. 547563, the purpose of which is to cause to be declared void, inoperative and ineffective because in violation of the rule against perpetuities, a certain trust agreement executed by me on the 3rd day of March, 1927, under which agreement I conveyed to my son Edward A. Smith, as Trustee, certain securities to be held thereunder, reserving to myself a life estate in the income of the said trust estate and making further provision for my two daughters and my son, or in the event of his death for his widow, containing other provisions as set forth in the said agreement which is set forth in full in my said bill of complaint. In that bill of complaint I further prayed for a decree by the court that by reason of the violation of the rule of perpetuities the whole of the trust arrangement so created should be destroyed and rendered void, that the trust by said agreement should be ended and terminated *in toto,* and that Continental Illinois Bank and Trust Company, Successor Trustee to my said son Edward A. Smith, now deceased, be ordered to account for and assign, transfer and set over to me all of the assets and property held by it in trust, and that I may thereupon hold and possess the same as my own absolute property free and clear of any trust declared in said trust agreement and free and clear of any right, claim or demand of any of the defendants in said suit, or of any person claiming by, through or under the provisions of said trust agreement.
>
> One of the defendants in the said suit is Virginia Winslow Smith, who, as the widow of my said son Edward A. Smith, under the terms of the said trust agreement as it now stands would, after my death, be entitled to a life estate in the income from one-third (⅓rd) of the said

trust property. In consideration of the said Virginia Winslow Smith consenting to a decree in accordance with the prayer of the bill in the said suit, I have agreed with her that upon such a decree being entered by the court, setting aside the said trust agreement and ordering Continental Illinois Bank and Trust Company to account for and to transfer all of the assets and property held by it as Successor Trustee under the terms of the said instrument to me, that I will forthwith set up and create for her benefit a new trust containing the provisions set forth in the draft of the trust agreement attached hereto, marked Exhibit "X" and now by reference made a part hereof as fully to all intents and purposes as though here set forth in full, and transferring to you, Continental Illinois Bank and Trust Company, as Trustee under the said instrument, the securities set forth in Schedule "A" attached to the said trust agreement, said securities being approximately one-third (⅓rd) of the securities now held by you as Successor Trustee under the trust agreement first aforesaid, after deducting, however, from such third a proportional part of such of the shares now held by you as Successor Trustee as shall be necessary to sell
26 and dispose of in order to pay the expenses of the said proceeding, the shares so to be set over unto you as Trustee under the trust agreement, draft of which appears as Exhibit "X" attached hereto, being as follows:

[List of securities.]

Accordingly, upon the delivery to you of this instrument, which delivery is to take place simultaneously with the entry by the court of such consent decree in the above entitled matter, I hereby sell, assign, transfer, convey and deliver to you the securities and property above described, such delivery to you to be effective at once upon the entry of such decree by its terms ordering you to assign, transfer and set over unto me all of the assets held by you in the trust first above referred to, and I hereby instruct you to cause to be transferred into your name as Trustee under the said trust agreement, draft of which is set forth in Exhibit "X" attached hereto, without first causing the same to be transferred into my name, the securities and property above listed, being the same as the securities and property referred to in Schedule "A" attached to the said trust agreement which is

attached hereto as Exhibit "X," the cost of which transfer, if any, to be paid by me; and I further direct you to hold said securities under the terms of the said trust agreement, draft of which is attached hereto as Exhibit "X", the original of which trust agreement I am delivering to you simultaneously with the delivery of this instrument, the same to be held by you and administered under the terms thereof, and I further direct that you cause to be transferred into my name all other securities and property, except that above listed, the cost of which transfer shall be paid by me, and deliver the same to me.

It is my intention herein that without the lapse of any period of time between the entry of such decree setting aside the trust agreement first above referred to, and the creation of the new trust, copy of the instrument creating which is attached hereto, marked Exhibit "X", the said new trust shall be immediately set up upon the dissolution of the old one so that the rights possessed by me to receive the income therefrom during my life and the right possessed by said Virginia Smith after my death to receive the income therefrom during her life, shall arise immediately upon the extinguishment of the similar rights, respectively, which I and the said Virginia Winslow Smith possess under the former trust agreement first above referred to.

The instrument was duly signed and acknowledged by the decedent.

The court decree was entered on February 27, 1932. By that decree the court found the following facts material to the issue:

That said trust agreement, by reason of said violation of said rule against perpetuities, was and is wholly inoperative and ineffective as to one-third of said trust fund; that said complainant intended and conceived the disposition of the whole of said trust fund as one single and connected distributive scheme and would not have created said trust and provided for the payment of either income or principal of any part of said fund to said Edward A. Smith or to any other beneficiary named in said instrument if she had known or had been advised that the provisions therein for distribution to the children of her son Edward surviving him were void, or that the further provisions for the distribution of shares designed for such children effective in the event he should leave no

child surviving him were void, and that by reason of the ineffectiveness of said provisions disposing of the corpus
27 of said share so set aside for said Edward A. Smith the whole of said scheme and trust arrangement is destroyed and rendered void:

That all assets and property held by the said Continental Illinois Bank and Trust Company as such successor trustee in said trust are the complainant's own absolute property free and clear from any trust declared in said trust agreement and free and clear of any right, claim or demand of the defendants herein or any of them, or any persons represented in this suit by said defendants or any of them, or any persons claiming by, through, or under the provisions of said trust agreement; * * *

The court decreed as follows:

It Is Therefore Ordered, Adjudged, and Decreed that the said trust agreement entered into on March 3, 1927 by and between the complainant, Clara R. Smith, as depositor, and her son, Edward A. Smith, as Trustee, and the trusts thereby declared, are wholly inoperative, void, and of no effect, for the reasons hereinbefore stated and the said trust agreement and the trusts thereby attempted to be created, and each and every of the same, are hereby declared to be wholly inoperative, void, and of no effect.

It Is Further Ordered, Adjudged, and Decreed that all the assets and property held by said Continental Illinois Bank and Trust Company as such successor trustee in said trust are the complainant's own absolute property, free and clear from any trust declared in said trust agreement, and free and clear of any right, claim, or demand of the defendants herein or any of them, or any persons represented in this suit by said defendants or any of them, or any person claiming by, through, or under the provisions of said trust agreement.

* * * * * *

It It Further Ordered, Adjudged, and Decreed that said Continental Illinois Bank and Trust Company, as such successor in trust, forthwith assign, transfer, and set over to the complainant, Clara R. Smith, all the assets and properties hereinbefore found to be held by it now as such successor trustee.

The new will contemplated by the family agreement was executed on March 8, 1932, in California and an identical will was executed in Illinois on September 10, 1932, the will of

March 8, 1932, being destroyed. The Illinois will was made to facilitate probate. The decedent released her interest in the corpus of the March 3, 1927, trust, the benefits from which accrued to Virginia Smith during her lifetime with the remainder to the decedent's two daughters, but retained the net income therefrom for her own life by executing the trust of February 17, 1932. The decedent made immediate gifts of $10,000 to each of two grandchildren as advances on her bequests to them.

The material provisions of the trust of February 17, 1932, are as follows:

> • • • the Trustor • • • has sold, assigned, transferred, conveyed and delivered and by these presents does sell, assign the securities and property described in Schedule A hereto attached • • •.
>
> First: (a) During the lifetime of the Trustor, but only after the death of Virginia Winslow Smith, the Trustor
> 28 may, at any time and from time to time by a further or supplemental instrument by her signed and acknowledged and delivered to the Trustee, (1) alter, change, or amend this agreement and the terms of the trust hereby created; (2) change the beneficiaries under this trust; (3) withdraw and receive all or any portion of the corpus of the trust estate; (4) wholly or partially revoke and annul the provisions hereof, Provided that the duties and responsibilities or the compensation of the Trustee shall not be changed or fixed without the consent of the Trustee; and (5) remove the Trustee and appoint a successor.
>
> • • • • • •
>
> Sixth: The income from the trust estate and the principal thereof shall be distributed as provided in Schedule B hereto attached, signed for further identification by the Trustor and by an officer of the Trustee, and made a part hereof as though at length fully set forth herein.
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> • • • • • •

SCHEDULE A.

[A list of securities deposited.]

SCHEDULE B.

* * * * * *

Providing for the Distribution of Principal and Income of the Trust Estate.

* * * * * *

The said Trustee shall pay all the net income arising from said trust estate to the Trustor, Clara R. Smith, for and during her natural life. Upon the death of said Trustor, Clara R. Smith, said Trustee shall pay the entire net income thereafter arising from said trust estate to Virginia Winslow Smith (daughter-in-law of said Trustor) for and during her natural life. Upon the death of both said Clara R. Smith and Virginia Winslow Smith said Trustee shall pay over and distribute all the principal of said trust estate, together with any accumulated and undistributed income thereon, to Lora Smith Cowan and Bessie Smith Bullard, (daughters of said Trustor) in equal parts, share and share alike. The income provided hereunder to be paid to the above named beneficiaries shall be paid in monthly installments.

During her lifetime the decedent received the income according to the provisions of schedule B. On February 17, 1932, the property described in schedule A was the same property and approximately one-third of all the property constituting the corpus of the trust of March 3, 1927. Pursuant to the direction contained in decedent's letter of February 17, 1932, to the trustee, the securities transferred by the trustee of the trust of March 3, 1927, were transferred directly to the trustee of the trust of February 17, 1932, without being transferred to the decedent or passing into her possession.

All the property comprising the second trust came out of the property comprising the first trust. The securities held under the first trust which were not transferred and de-
29 livered by the trustee into the second trust or transferred and delivered to the decedent's grandchildren were transferred to the name of the decedent.

The trust under which the property in controversy was held

at the date of the decedent's death (May 21, 1933) was executed on February 27, 1932. At that time the joint resolution[1] amending section 302 of the Revenue Act of 1926[2] was in effect. This provision was further amended by section 803 of the Revenue Act of 1932,[3] passed before the decedent's death.

The petitioner contends that even though the cited statute does apply to the situation before us, the facts bring it within the exception. He asserts that the consideration for which the trust was established was the execution of the family agreement and that the transfer "amounted to a *bona fide* sale for an adequate and full consideration in money or money's worth."

It is a well established principle, particularly in Illinois, that a family settlement agreement constitutes a valid consideration for the conveyance of property. *Hall* v. *Hall*, 125

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[1] Public Resolution—No. 131—71st Congress (H. J. Res. 529)
Joint resolution to amend Sect. 302 of the Rev. Act of 1926.
Resolved by the Senate and House of Representatives of the United States of America in Congress assembled. That the first sentence of subdivision (c) of sect. 302 of the Revenue Act of 1926 is amended to read as follows:
"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth."
Approved March 3, 1931.

[2] Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * *

[3] Sec. 803. Future Interests.
(a) Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:
"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

Ill. 95; 16 N. E. 896; *Cole* v. *Cole,* 292 Ill. 154; 126 N. E. 752; *Hagen* v. *Anderson,* 317 Ill. 173; 147 N. E. 791; *Stedman* v. *Tate,* 326 Ill. 442; 158 N. E. 97. But a valid consideration is not necessarily "an adequate and full consideration in money or money's worth" as specifically required in the statutory exception. We have so held in cases involving similar consideration. *Lillian T. Latty, Executrix,* 23 B. T. A. 1250; affd., 62 Fed. (2d) 952; *Central Union Trust Co. of New York et al., Executors,* 24 B. T. A. 296. See *Prewit* v. *Wilson,* 103 U. S. 22.

The facts in the case at bar bring it precisely within the purview of the statute. By the trust of February 27, 1932, the decedent transferred certain stock, the right to the net income from which she retained during her natural life. The petitioner seeks to avoid the application of the statute on the theory that it was impossible for Clara R. Smith to transfer the corpus of the trust because she had parted with the ownership of it under the old trust and had never regained it; furthermore, that she had executed the new trust by virtue of the family agreement under which the rights of herself and Virginia Smith were preserved exactly as they had existed under the old trust.

Even if we give full faith and credence to the family agreement, as we construe that arrangement we can not agree with the petitioner's argument. The execution and performance of the terms of that agreement created a valid consideration for all the transactions and acts done pursuant to it, but the several portions of the agreement must be examined to determine exactly what the various parties were to do. Moreover, we must consider what was actually done.

The old trust was being subjected to attack and litigation was threatened. In order to prevent such an undesirable procedure, the adult members of the family agreed to extinguish the old trust by means of a friendly court action and to create a new trust which would grant Virginia Smith rights identical with those she had enjoyed under the old trust. Her old rights were extinguished with the death of the old trust and a similar new interest rendering her position equivalent to that which she had previously enjoyed was created. The rights of others were substantially altered. In order to accomplish this result the parties to the contract agreed to procure the cancellation of the old trust on the ground that it violated the rule against perpetuities.

The notice given by the decedent on February 17, 1932, to

the trustee contains a comprehensive and exact picture of the status of the old trust as seen by the decedent, Virginia Smith, and the other members of the family. The letter states that it is the decedent's intent that the right of herself and Virginia Smith to receive the income from the corpus during their respective lives shall *arise* under the new trust immediately upon the extinguishment of *similar* rights under the old trust. The decree of the court declared the old
31 trust void and ordered the property transferred to decedent, its absolute owner.

Thus, in contemplation of the parties at the time the new trust was executed and by the very terms of the decree of the court, the complete and exclusive ownership and control of the stock which the respondent proposes to tax as a part of the decedent's estate was restored to her. Indeed, it was a recognized and essential part of the agreement that she should acquire full possession of, title to, and power of disposition over the property in order that she might reconvey a portion of the same property in trust for the benefit of Virginia Smith and others.

The decedent then proceeded to carry out her part of the family agreement by creating the new trust, retaining the income to herself, making immediate gifts, altering bequests, and executing a new will. The intervention of the quoted statute rendered such property subject to tax at her death.

The petitioner stresses the fact that the trust corpus passed directly from the trustee of the old trust to the trustee of the new trust. He overlooks, however, the further fact that this procedure was adopted, obviously as a convenience, by the express authority and direction of Clara R. Smith contained in her letter of February 17, 1932, to the trustee. She received the title to and, constructively, the possession of the property in accordance with the terms and purposes of the family agreement.

We can see no inharmony in holding that the trust of February 17, 1932, is entirely separate and distinct from the trust of March 3, 1927. On the contrary, the establishment of the later trust was the outcome of and consonant with the family agreement. It became an independent instrument and the parties thereto so intended. All adult members of the family joined in the rearrangement of the decedent's estate. The interests of the infant members were protected by the customary legal safeguards. The decree of the court declared in plain and emphatic language that the decedent was the abso-

lute owner of the property and ordered it transferred to her. The adult parties consented to the entry of that decree. Therefore, they can not now be heard to deny its plain and unequivocal effect.

The parties stipulated that on the presentation of proper proof of payment the petitioner should receive credit in the computation under Rule 50 for inheritance taxes paid to the State of Illinois.

Reviewed by the Board.

Decision will be entered under Rule 50.

ered May 21, 1936. 32 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—77764) * *

DECISION.

Pursuant to opinion of the Board promulgated April 3, 1936, the respondent in the above entitled proceeding filed notice of settlement with the Board on May 4, 1936, and the case having been called for hearing on May 20, 1936, at which time no objection was offered to the proposed settlement, it is Ordered and Decided: That there is a deficiency in estate tax of $17,271.46.

(Signed) ERNEST H. VAN FOSSAN
Member.

(Seal)

Entered May 21, 1936.

Filed Aug. 11, 1936. 33 IN THE UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—77764) * *

PETITION OF SELLAR BULLARD, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF CLARA R. SMITH, DECEASED, FOR REVIEW, BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OF A DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

Filed August 11, 1936.

Sellar Bullard, as Executor under the Last Will and Testament of Clara R. Smith, deceased, the petitioner in this cause, by Samuel S. Holmes, Lorentz B. Knouff, and Samuel H.

Horne, counsel, hereby files his petition for a review by the United States Circuit Court of Appeals for the Seventh Circuit of the decision by the United States Board of Tax Appeals rendered on May 21, 1936, 34 B. T. A. ____, No. 41, determining a deficiency in Federal Estate Tax in the amount of $17,271.46, to be due from the Estate of Clara R. Smith, deceased.

34 I.

The petitioner is Sellar Bullard as Executor under the Last Will and Testament of Clara R. Smith, deceased.

Pursuant to the provisions of the Revenue Act of 1926, Section 1001(a), as amended by Revenue Act of 1932, Section 1101(a), Revenue Act of 1926, Section 1002, as amended by Revenue Act of 1934, Section 519(a), and Revenue Act of 1926, Section 1003, the petitioner herein seeks a review of the decision of the United States Board of Tax Appeals by the United States Circuit Court of Appeals for the Seventh Circuit.

II.

Nature of the Controversy.

The controversy involves the determination of whether a deficiency of Federal Estate Tax in the sum of $17,271.46 has been assessed properly against the estate of Clara R. Smith, deceased, such assessment of said deficiency arising as the result of the inclusion in the gross value of said estate of the corpus of a certain trust under trust indenture dated February 17, 1932, consisting of securities of the aggregate value of $112,148.75.

On March 3, 1927, decedent created a trust of certain securities having an aggregate value in excess of $300,000.00. (Petitioner's Exhibit 1.) Her son, Edward A. Smith, was made trustee thereof. The trust instrument reserved no power of revocation. Under this trust decedent reserved the entire income to herself for life. Upon her death the trustee was
35 directed to set aside the sum of $300,000.00 to be divided into three separate trust funds of $100,000.00 each, the income from which should be paid to the decedent's three children, Lora Smith Cowan, Bessie Smith Bullard, and Edward A. Smith, during their lifetime. After the respective deaths of the two daughters the income from their trusts was

to be paid to their respective children until the youngest living at the time the trust was established should attain the age of twenty-six years or, if deceased, then when such child, if living, would have arrived at that age, at which time the principal of each of said two trusts was to be divided equally among the children entitled thereto.

Upon the death of the son, Edward A. Smith, the income of his fund was to be paid to his widow during her lifetime unless a child or children survived her, in which event the income was to be paid to such child or children until the youngest should obtain the age of twenty years, when the corpus was to be divided equally among such children. If any of Edward's children should die before the distribution of the corpus, then the income was to be paid to the heirs at law of any such child until the time set for final distribution. If Edward died leaving no child surviving, the corpus was to be paid to the children of his sisters, subject to the intervening life estate of his widow. The corpus remaining after establishing the three $100,000 trust funds was to be divided into three equal parts upon the death of decedent, and to be paid to each of her three children if living, but if any be deceased, the share of such deceased child was to be added to the $100,000.00 trust fund created for that child.

36 Edward A. Smith died without issue on December 16, 1928, leaving surviving him his widow, Virginia Winslow Smith. Upon his death the Illinois Merchants Trust Company became the successor trustee and, upon its merger with the Continental Illinois National Bank and Trust Company, the latter became successor trustee.

Under the provisions of the trust agreement of March 3, 1927, upon Edward's death the income of his $100,000.00 trust fund, after the death of decedent, became payable to his widow, Virginia Winslow Smith, during her lifetime.

In August, 1929, the decedent executed a will giving pecuniary bequests aggregating $63,000.00 to persons outside the immediate family, and giving one-half of the remainder of her estate to her daughter, Bessie Smith Bullard, absolutely, and the other half thereof to the Chicago Title and Trust Company and Sellar Bullard, as trustees, to pay the net income therefrom to her daughter, Lora Smith Cowan, for her life, with remainders to her children. (Petitioner's Exhibit 2.)

In 1931 the decedent became dissatisfied with the trust of March 3, 1927, for the reason that the corporate successor trustee insisted on selling or exchanging American Can Com-

pany preferred stock, which constituted a large holding of the trust, in order to effect a greater diversification of investment. The decedent, as well as her two daughters, beneficiaries of the trust, had great faith in said stock as a trust investment. They believed that if the trustee did not sell the stock before decedent's death it would do so thereafter.

37 Various family conferences were held, and it was decided that the proper procedure was for the decedent to recall into her control the greater part of the American Can Company preferred stock. Upon consulting with her attorney and Sellar Bullard, her son-in-law and business adviser, the decedent was informed that the trust of March 3, 1927, was irrevocable. She had been led to believe the contrary by her son Edward, who was designated as trustee of said trust upon its creation. Decedent was advised by her attorney that a friendly dissolution of the trust could be effected, however, if all adult parties in interest would join in a court action, which would be necessary for dissolution, due to the interests of the minors who were future beneficiaries of the trust.

Virginia Winslow Smith, widow of Edward, refused, however, to consent to the cancelation and termination of the trust. Thereupon decedent instructed her attorney to prepare a bill praying that the trust be declared void on the ground of misrepresentation and fraud on the part of her son Edward (Petitioner's Exhibit 23). This alarmed decedent's daughters, who knew that Virginia Winslow Smith would oppose any such action, and that the family discord resulting therefrom would become public. This bill was not filed, but a later action was brought, upon the suggestion of decedent's attorney, to declare the trust void on the ground that certain of its provisions violated the Rule against Perpetuities (Petitioner's Exhibits 3, 9, 10). Upon the filing of this bill Virginia Winslow Smith denied that the trust was invalid and refused to consent to the entry of any decree declaring it so. Later,

38 however, she agreed to consent to the entering of such a decree on the sole condition that her rights and interest should be preserved exactly as they were in the trust of March 3, 1927. After such agreement by Virginia Winslow Smith, the owners of all the beneficial interests under the trust of March 3, 1927, including decedent, owner of the life interest thereunder, and all the beneficiaries named in decedent's will, for the purpose of avoiding a family quarrel and preventing unpleasant litigation with its consequent undesirable notoriety, entered into an oral family settlement agreement. This

agreement provided (1) that in consideration of consent of the beneficiaries other than decedent to the entering of a decree terminating the old trust under the pending action, and of the release by said beneficiaries of their interests in approximately two-thirds of the corpus of said trust, decedent would release whatever interest she might have as to the other one-third of the corpus of said trust, which release would take the form of the execution of a new trust as to said approximate one-third of said corpus, being that approximate one-third of said first trust in which Virginia Winslow Smith had a life estate after the death of decedent; that the new trust would preserve to Virginia Winslow Smith the identical interest which she possessed under the old trust; Virginia Winslow Smith further stipulated that the proposed new trust should be executed prior to the entry of the decree dissolving the old trust; (2) that the decedent would execute a new will bequeathing enlarged interests to the minor beneficiaries under the first trust and making adequate provision for the adult bene-
39 ficiaries thereunder, other than Virginia Winslow Smith; (3) that decedent would make certain gifts outright to two of her grandchildren who were beneficiaries under the old trust in consideration of their relinquishing their interests thereunder.

Pursuant to the said family settlement agreement, the new trust indenture was executed by decedent on February 17, 1932 (Petitioner's Exhibit 4). It provided that the trustee should pay all the net income therefrom to the decedent during her lifetime, and upon her death the trustee was instructed to pay the entire income to Virginia Winslow Smith during her life. Upon the death of both decedent and Virginia Winslow Smith the trustee was directed to distribute the principal to decedent's two daughters, Lora Smith Cowan and Bessie Smith Bullard. Said trust instrument of February 17, 1932, provided that the decedent should have power to alter, amend, or revoke the trust as to the remainder interests subsequent to the life estate of Virginia Winslow Smith; such power to alter, amend, or revoke to arise in decedent only upon her surviving the said Virginia Winslow Smith, and being contingent upon such survival.

Pursuant to the family settlement agreement a new will was prepared, eliminating $53,000.00 from gifts to persons other than the immediate family, bequeathing certain definite sums to the decedent's grandchildren, establishing two $100,000.00 trusts for the benefit of her daughters for life, remainders to

their respective children, and bequeathing the residue of her estate to her two daughters equally (Petitioner's Exhibit 5).

40 Before entry of the decree terminating the first trust the second trust was drawn and executed, the new will of decedent was drawn, and the terms and provisions thereof agreed upon by all the parties to the family settlement agreement other than Virginia Winslow Smith, and the specific securities to be transferred to the grandchildren as immediate gifts were designated by written instructions by the decedent to the trustee to be paid over upon termination of the first trust, and all documents necessary to complete execution of the family settlement agreement prepared. Thereafter, and on February 27, 1932, a decree was entered by the Superior Court of Cook County, Illinois, terminating the first trust of March 3, 1927, and by its terms restoring the property held thereunder to the decedent, free of said trust (Petitioner's Exhibit 20). The trustee thereupon transferred the securities comprising the second trust directly from the first trust into the second trust without transferring them to decedent.

The new will was sent from Chicago to decedent in California and executed by her there on March 8, 1932, and an identical will was executed by her in Illinois on September 10, 1932, to facilitate probate in Illinois (Petitioner's Exhibit 21), the will executed on March 8, 1932, being destroyed. The outright gifts of $10,000 each to two of decedent's grandchildren provided for in the family agreement were made by the trustee transferring out of the first trust to each of them 100 shares of the American Can Company stock, without transferring them to decedent.

Decedent received the income from the trust of February 17, 1932, until her death, on May 24, 1933. Virginia Winslow Smith survived decedent, and is at the present time re-

41 ceiving the income from the said trust of February 17, 1932.

The Commissioner of Internal Revenue held that the corpus of said second trust of February 17, 1932, should be included in decedent's gross estate for Federal Estate Tax purposes under the provisions of Revenue Act of 1926, Sec. 302(c), as amended by Joint Resolution approved March 3, 1931 (Pub. No. 181), and by Revenue Act of 1932, Sec. 803(a), for the reason that under said second trust decedent received the income therefrom during her lifetime, and under the provi-

sions of Revenue Act of 1926, Sec. 302(d), claiming that a right to revoke the said second trust was reserved to decedent.

The petitioner has contended:

(1) That the corpus of said trust is not includable properly in decedent's gross estate under the Revenue Act of 1926, Sec. 302(c), as amended as aforesaid, for the reasons that decedent parted irrevocably with the corpus of said trust at the time of the creation of the first trust of March 3, 1927, and all the interests under said trust vested in the beneficiaries thereunder as of that date; that regardless of the intervening creation of the second trust of February 17, 1932, and the subsequent dissolution of the first trust, decedent never regained any control over the said property constituting the corpus of the second trust, and was not the actual creater of the second trust, since the dissolution of the first trust and the creation of the second trust were acts done by decedent in pursuance of a family settlement agreement, which agreement bound her to the creation of said second trust in
42 consideration of the consent of the beneficiaries thereunder other than decedent to the dissolution of the first trust; that at all times since the creation of the first trust of March 3, 1927, the beneficial interest and title in all the property which constitutes the corpus of the second trust of February 17, 1932, has been in persons other than the decedent, i. e., beneficiaries under the said second trust; that decedent had no interest in the property transferred under the trust of February 17, 1932, except the right to receive the income therefrom during her life, which right she had acquired under the first trust of March 3, 1927, so that at the time of creation of the said second trust decedent "retained" no interest in either the corpus or income of said trust within the provisions of said Sec. 302(c) as amended as aforesaid. The trust of March 3, 1927, being irrevocable, was not subject to Federal Estate Tax under the taxing statute in effect at the time of its creation, regardless of the fact that the decedent reserved the right to the income therefrom during her lifetime;

(2) That the corpus of said trust of February 17, 1932, is not subject to Federal Estate tax under the provisions of the Revenue Act of 1926, Section 302(d), for the reason that since the contingency upon which the right of decedent to revoke the second trust of February 17, 1932, never arose and became impossible of occurrence upon decedent's death under the provisions of said second trust indenture, decedent

at no time had, since the creation of said first trust of March 3, 1927, any power to alter, amend, or revoke the said
43 trust of February 17, 1932, or to recall to her possession or ownership any of the property constituting said second trust of February 17, 1932.

The parties have stipulated that on presentation of proper proof of payment the petitioner should receive credit against a deficiency finally determined, if any, for inheritance taxes paid to the State of Illinois.

III.

The said Sellar Bullard, as Executor under the Last Will and Testament of Clara R. Smith, deceased, being aggrieved by the finding of fact and conclusions of law contained in the said findings and opinion of the Board, and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Seventh Circuit.

44 IV.

Assignments of Error.

The petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

(1) The holding that the corpus of the trust of February 17, 1932, is subject to Federal Estate Tax under Revenue Act of 1926, Section 302(c), as amended by Joint Resolution approved March 3, 1931 (Pub. No. 131), and by Revenue Act of 1932, Section 803(a).

(2) The failure to hold that the corpus of said trust of February 17, 1932, is not subject to Federal Estate Tax under Revenue Act of 1926, Section 302(d).

(3) The failure to hold that the Revenue Act of 1926, Section 302(c), as amended by Joint Resolution approved March 3, 1931 (Pub. No. 131), and by Revenue Act of 1932, Section 803(a), is contrary to and in violation of the Fifth Amendment to the Constitution of the United States.

(4) The failure to hold that the Revenue Act of 1926, Section 302(c), as amended by Joint Resolution approved March 3, 1931 (Pub. No. 131), and by Revenue Act of 1932, Section 803(a), as applied by the Commissioner of Internal Revenue in this case, is contrary to and in violation of the Fifth Amendment to the Constitution of the United States.

(5) The failure to hold that the Federal Estate Tax
45 statute applicable to determine whether the corpus of the trust property properly is includable in the gross estate of decedent is the Federal Estate Tax statute in force and effect on March 3, 1927, the date of creation of the first trust, and not the Federal Estate Tax statute in force and effect on February 17, 1932, the date of creation of the second trust.

(6) The holding that the trust of February 17, 1932, is separate and distinct from the trust of March 3, 1927.

(7) The holding that the Revenue Act of 1926, Section 302(c), as amended as aforesaid, intervened between dissolution of the first trust and creation of the second trust to render the property constituting the corpus of the second trust subject to tax at decedent's death.

(8) The holding that the right of the decedent to the income during her lifetime was retained by her under the said second trust within the provisions of Revenue Act of 1926, Section 302(c), as amended as aforesaid.

(9) The failure to hold that the decedent retained no right or interest either as to corpus or income of the trust created on February 17, 1932, within the provisions of the Revenue Act of 1926, Section 302(c), as amended as aforesaid.

(10) The failure to find that decedent had no right in respect either of the property or the income which she could have retained under and by virtue of the second trust instrument.

46 (11) The failure to find that the entire beneficial interest which decedent had under the second trust of February 17, 1932, being the right to receive the entire income therefrom during her lifetime, had vested in her before the creation of said second trust and upon the creation of the irrevocable first trust of March 3, 1927.

(12) The failure to find that at no time before decedent's death did she have any right or interest in either the corpus or income of the trust of February 17, 1932, which right or interest had not already been vested in her under the first irrevocable trust created on March 3, 1927.

(13) The failure to find that there was no change in respect to decedent's beneficial interest in the property constituting the trust of February 17, 1932, at any time subsequent to the creation of the irrevocable first trust of March 3, 1927.

(14) The failure to hold that since the first trust of March 3, 1927, was irrevocable and therefore not subject to Federal

Estate Tax, the property constituting the corpus and income of the second trust of February 17, 1932, is not includable in decedent's gross estate for Federal Estate Tax purposes.

(15) The failure to find that the provisions of the family settlement agreement bound decedent to carry out the provisions thereof required to be carried out by her, viz: (1) the creation of the second trust of February 17, 1932, (2) the
47 execution of the new will, and (3) the making of the specific outright gifts to grandchildren who were beneficiaries under the first trust of March 3, 1927.

(16) The failure to find that the provisions of the family settlement agreement requiring decedent to create said second trust, to execute said new will, and to make said outright gifts were specifically enforcible against decedent in equity by the other parties to said agreement, namely, the beneficiaries other than decedent of the first trust of March 3, 1927.

(17) The failure to find that by the decree of court dissolving the first trust nothing more than bare legal title to the trust property was revested in decedent, as trustee herself, to convey and dispose of same in accordance with the terms of the specifically enforcible family settlement agreement.

(18) The finding that the decree of court terminating the first trust revested in decedent any right or interest in the property constituting the second trust, other than the bare legal title thereto, which legal title was necessary to the transfer of legal title from the trustee under the first trust to the trustee under the second trust.

(19) The finding that it was decedent's intent that the interests of decedent and of Virginia Winslow Smith under the first trust be extinguished by the dissolution of said trust, and that similar new rights arise in them under the second trust.

48 (20) The failure to find that the beneficial right of decedent to receive the entire income from the property constituting the corpus of the second trust of February 17, 1932, during her lifetime, and of Virginia Winslow Smith to receive said income for life after the death of decedent, existed intact in the said decedent and Virginia Winslow Smith from the date of creation of the first trust of March 3, 1927, and that such was decedent's intent.

(21) The finding that the parties contemplated at the time the second trust was executed that complete and exclusive ownership and control of the stock constituting the corpus

of the second trust, which the Commissioner of Internal Revenue has taxed as a part of decedent's gross estate, be restored to her by dissolution of the first trust.

(22) The finding that it was a part of the family agreement that possession of, title to, and power of disposition over the property constituting the corpus of the second trust should be acquired by decedent by dissolution of the first trust.

(23) The holding that decedent received title to and constructive possession of the property which became the corpus of the second trust upon dissolution of the first trust.

(24) The failure to find that immediately upon dissolution of the first trust by decree of court on February 27, 1932, all beneficial title and interest in or to the property constituting the corpus of the second trust which had theretofore been created on February 17, 1932, vested in the
49 beneficiaries under said second trust as of the date of the creation thereof under the principles of estoppel as applied to after-acquired property.

(25) The holding that because of their consent to the entry of the decree terminating the first trust of March 3, 1927, the adult parties to the action for such termination who were beneficiaries of such trust, cannot now deny that the effect of such decree was to make decedent the absolute owner of the part of the property of the said first trust which became the corpus of the said second trust of February 17, 1932.

(26) The failure to hold that the transfer under the trust of February 17, 1932, in pursuance of the family settlement agreement, amounted to a "bona fide sale for a full and adequate consideration in money or money's worth" under the terms of the applicable Federal Estate Tax statutes.

(27) The determination that there is a deficiency in Federal Estate Tax in the sum of $17,271.46 due from the Estate of the decedent, in lieu of a determination that there is no deficiency in Federal Estate tax due from the decedent's estate.

Samuel S. Holmes,
Lorentz B. Knouff,
Counsel for Petitioner,
69 West Washington Street,
Chicago, Illinois.
Samuel H. Horne,
Counsel for Petitioner,
1150 Munsey Building,
Washington, D. C.

50 United States of America } ss.
District of Columbia }

Samuel H. Horne, being first duly sworn, says that he is counsel of record in the above-named cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information, and belief.

(Sgd.) Samuel H. Horne.

Subscribed and Sworn to before me this 11th day of August, 1936.

(Sgd.) Charles E. Foster, Jr.
Notary Public.

(Seal)

254 UNITED STATES BOARD OF TAX APPEALS. Entered Oct. 1936.

* * (Caption—77764) * *

ORDER ENLARGING TIME.

On motion of counsel for the petitioner, without objection by counsel for the respondent, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Seventh Circuit, be and it is hereby extended to December 15, 1936.

(Signed) Eugene Black,
Member.

Dated: Wash. D. C., Oct. 2, 1936.

Now, Dec. 15, 1936, the foregoing order enlarging time certified from the record as a true copy.

B. D. Gamble,
Clerk, U. S. Board of Tax Appeals.

(Seal)

red Dec. 12, 36. 255 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—77764) * *

ORDER ENLARGING TIME.

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals for the Seventh Circuit be and it is hereby extended to December 22, 1936.

(Signed) Eugene Black,
Member.

Dated: Washington, D. C. December 12, 1936.

Now, Dec. 15, 1936, the foregoing order enlarging time certified from the record as a true copy.

B. D. Gamble,
Clerk, U. S. Board of Tax Appeals.

Nov. 30, 36. 251 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—77764) * *

PRAECIPE FOR RECORD.

Filed Nov. 30, 1936.

To the Clerk of the United States Board of Tax Appeals:

You Are Hereby Requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, with reference to Petition for Review heretofore filed by the petitioner in the above entitled cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

1. The docket entries of all proceedings before the Board of Tax Appeals;

2. Pleadings before the Board of Tax Appeals, as follows:

(a) Petition for Redetermination, with Exhibits A and B attached;

(b) Answer of the Respondent;

252 3. The findings of fact and opinion of the Board of Tax Appeals;

4. The decision of the Board of Tax Appeals;

5. The Petition for Review, filed by the Petitioner in the above cause;

6. The statement of evidence with Exhibits 1, 1-A, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23 attached;

7. This Praecipe.

Samuel S. Holmes,
Samuel S. Holmes,
Lorentz B. Knouff,
Lorentz B. Knouff,
Attorneys for Petitioner.

The respondent acknowledges receipt of a copy of the foregoing praecipe for record.

Dated this 30th day of November, 1936.

Herman Oliphant,
Attorney for Respondent.

253 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—77764) * *

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 252, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 12th day of December, 1936.

B. D. Gamble,
(Seal) *Clerk, United States Board of Tax Appeals.*

ed Dec. 22, 1936.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Sellar Bullard, as Executor under the Last Will and Testament of Clara R. Smith, Deceased,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.

Docket No. 6120.
Appeal from B. T. A.

STIPULATION.

It is hereby stipulated and agreed that, subject to the approval of the Court, there be printed all of the certified transcript of the record herein except Exhibit No. 22, being a copy of the Estate Tax Return filed by the executor petitioner herein; that, in order to save printing costs, said Exhibit No. 22 be not printed but that it remain a part of the certified record herein.

It is further stipulated that an order may be entered pursuant hereto without further notice to the parties.

Samuel S. Holmes,
Lorentz B. Knouff,
Samuel H. Horne,
Attorneys for the Petitioner.
Robert H. Jackson,
Attorney for the Respondent.

Endorsed: Filed Dec. 22, 1936. Frederick G. Campbell, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 162, inclusive, contain a true copy of the printed record, printed under my supervision, and filed on January 15, 1937, on which the following entitled cause was heard and determined: Sellar Bullard, as Executor Under the Last Will and Testament of Clara R. Smith, Deceased, vs. Commissioner of Internal Revenue, No. 6120, October Term, 1936, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 11th day of August A. D. 1937.

[SEAL]

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of The United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court House in the City of Chicago in said Seventh Circuit, on the Sixth day of October of the October Term in the year of our Lord One Thousand Nine Hundred and Thirty-Six and of our Independence the One Hundred and Sixty-First.

6120

SELLAR BULLARD, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF CLARA R. SMITH, DECEASED

vs.

COMMISSIONER OF INTERNAL REVENUE

Petition for Review of Decision of the United States Board of Tax Appeals

And on, to wit, the 22nd day of December 1936, there was filed in the office of the Clerk of this Court a stipulation relative to printing record, which said stipulation is in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Seventh Circuit

SELLAR BULLARD, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF CLARA R. SMITH, DECEASED, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 6120. Appeal from B. T. A.

Stipulation

It is hereby stipulated and agreed that, subject to the approval of the Court, there be printed all of the certified transcript of the record herein except Exhibit No. 22, being a copy of the Estate Tax Return filed by the executor petitioner herein; that, in order to save printing costs, said Exhibit No. 22 be not printed but that it remain a part of the certified record herein.

It is further stipulated that an order may be entered pursuant hereto without further notice to the parties.

SAMUEL S. HOLMES,
LORENTZ B. KNOUFF,
SAMUEL H. HORNE,
Attorneys for the Petitioner.
ROBERT H. JACKSON,
Attorney for the Respondent.

(Endorsed:) Filed Dec. 22, 1936. Frederick G. Campbell, Clerk.

And afterwards, to wit, on the 11th day of May 1937, the following further proceedings were had and entered of record, to wit:

Tuesday, May 11, 1937

Court met pursuant to adjournment before Hon. William M. Sparks, Circuit Judge; Hon. J. Earl Major, Circuit Judge; Hon. Walter C. Lindley, District Judge.

6120

SELLAR BULLARD, AS EXECUTOR, ETC.

vs.

COMMISSIONER OF INTERNAL REVENUE

Petition for Review of Decision of the United States Board of Tax Appeals

Now this day come the parties by their counsel, and this cause comes on to be heard on the printed record and briefs of counsel, and on oral argument by Mr. Samuel S. Holmes, counsel for petitioner,

and by Mr. Arnold Raum, counsel for respondent, and the Court having heard the same takes this matter under advisement.

And afterwards, to wit, on the 25th day of May, 1937, there was filed in the office of the Clerk of this Court the opinion of the Court, which said opinion is in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit

No. 6120. October Term, 1936, April Session, 1937

SELLAR BULLARD, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF CLARA R. SMITH, DECEASED, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for Review of Decision of the United States Board of Tax Appeals

May 25, 1937

Before SPARKS and MAJOR, Circuit Judges, and LINDLEY, District Judge

LINDLEY, District Judge. Petitioner, as executor of the last will and testament of Clara R. Smith, Deceased, asks this court to reverse a decision of the Board of Tax Appeals, affirming an assessment of deficiency in a federal estate tax in the sum of $17,271.46, assessed by the commissioner against the estate of the deceased. The deficiency arose out of the action of the commissioner in including in the gross value of the estate the corpus of a certain inter vivos trust agreement dated February 17, 1932. Mrs. Smith died testate on May 24, 1933.

On March 3, 1927, the decedent created an irrevocable trust of certain securities, under which the income from the property was reserved to the donor during her life time; upon her death the trust estate was to be divided into three separate funds. The income therefrom was to be paid thereafter to the decedent's three children during their lives and after their deaths to her grandchildren until the youngest should attain the age of twenty-six, whereupon the funds were to be divided equally among the grandchildren. One of her children was a son, Edward A. Smith. The income from his representative portion of the trust fund was to be paid, in case of his death, to his widow during her life time, unless a child or children survived him, in which event income and principal were to go to such children. If no child survived Edward, upon his death and that of his widow, the principal of the trust funds of which he was beneficiary was to be paid one-half to the children of each of the decedent's two daughters. The son died on December 16, 1926, leaving a widow but no children, and upon his death, under the terms of the trust, his

widow became entitled to the income from the trust fund of $100,000, subject to the life estate of the decedent.

In 1931 the decedent became dissatisfied with the trust arrangement; learned, as she said, for the first time, that the trust was irrevocable, but was advised by an attorney that it probably violated the rule against perpetuities and was, therefore, void, but that it was possible, because of the interest of minors, to dissolve the trust only by court decree. At first the widow of Edward refused to consent to termination or modification of the trust, but finally assented to a decree of dissolution, provided her rights should be preserved precisely as provided in the original trust agreement.

Thereupon, in order to avoid family controversy, unpleasant litigation, and consequent undesirable notoriety, the interested parties entered into a parol agreement providing that, upon entry of a decree terminating the old trust, a new one would be created and that the corpus thereof would be the portion of the securities of which Edward and his widow were the beneficiaries under the old trust. As to that, she was to have the rights she possessed under the old trust, under which the income was to be payable to decedent during her life. It was agreed that the remainder of the original trust should be dissolved and that in lieu thereof, the decedent would make a new will devising and bequeathing unto the minor beneficiaries larger property rights and that the new trust should be created prior to the entry of a decree dissolving the old one.

Accordingly a second trust indenture was executed on February 17, 1932, and the new will prepared. On the same date, the decedent wrote to the Continental Illinois Bank and Trust Company, trustee under both trusts, stating that she had filed her bill to cancel the original trust and to have it declared void, inoperative, and ineffective because in violation of the rule against perpetuities, saying that in her bill she was seeking a decree dissolving the trust because of its invalidity, adjudging that the trust agreement be destroyed, rendered void and terminated in toto, ordering the trustee to account for, assign, transfer, and set off to her all the property held in trust and decreeing that she hold and possess the same as her own and absolute property, free and clear of any right or claim in any other person. She further advised the trustee that she was creating a new trust; that she was selling and conveying to the trustee, acting as such under the new trust, the securities then held representing the son's interest in the old trust, to hold under the new agreement; that she would pay the cost of the transfer and that her rights to receive the income from the new trust and the rights of her son's widow therein should arise immediately upon extinguishment of the old trust.

On February 27, 1932, the court, with jurisdiction of the parties, found that the trust agreement, by reason of the violation of the rule against perpetuities, was wholly inoperative and ineffective as to one-third of the fund; that the decedent had intended and conceived the disposition of the whole of said trust fund as a single and connected distributive scheme and would not have created the trust had she known that any part thereof was void and that by reason of such

facts the whole of the trust arrangement was destroyed and rendered void; that all assets and property held by the trustee were the decedent's own absolute property, free and clear of any trust and of any right, claim, or demand of any other party. The court directed the trustee to assign to the decedent all the trust funds.

The new trust provided that trustor "has sold, assigned, transferred, conveyed, and delivered and by these presents does sell and assign the securities and property described in the schedules" to the trustee as such; that during the life time of the trustor, but only after the death of the son's widow, the trustor might alter the trust, change the beneficiaries, withdraw and receive all of the corpus of the trust, and wholly or partially revoke the trust. Mrs. Smith was to receive the income from the new trust during her life time, and upon her death same was to be paid to the son's widow during her life time, and, upon the death of both the decedent and the son's widow, the trustee was directed to pay over all the principal of the estate to the decedent's two daughters.

All of the corpus of the old trust other than that included in the new trust was surrendered and delivered to the decedent or to her nominees.

The petitioner contends that under these facts no property of the decedent passed to the new trust; that under it she retained no interest not already vested in her under the first trust; that the creation of the second trust amounted to a bona fide and adequate sale for full consideration exempt under the statute. It becomes material, therefore, at the outset to determine the effect of the facts above stated.

It is to be observed that by the terms of the decree, the first trust was set aside and terminated and the corpus thereof adjudged to be the property of the decedent. True, she never received from the trustee the specific securities constituting the corpus of the second trust, but that was because she directed the trustee to transfer the same directly to the new trust. Under the decree of the court, the title of the corpus of the new trust, upon dissolution of the old trust, rested in her free of right, title, or claim of any other person. She was the absolute owner thereof and it was her property that passed into the corpus of the new estate. Consequently there was no bona fide sale but rather a creation of a new trust out of her own estate.

But it is said that the decree was merely a consent decree based upon a family settlement. In Freeman on Judgments, Vol. 3, 5th Ed., Sec. 1350, it is said: "It is difficult to conceive upon what theory the action of the court in rendering judgment upon the agreement of the parties may be treated as not judicial and conclusive." In Vol. 3, 5th Ed., Sec. 1361, the writer says: "So a consent decree, conclusive where rendered, is conclusive in other states." In Vol. 2, 5th Ed., Sec. 663, it is said: "The same general rules which govern judgments generally apply to a judgment by consent or upon stipulation. It is an estoppel, merger, or bar under the same circumstances and to same extent as any other judgment." In Harding v. Harding, 198 U. S. 317, the court said: "The general rule in Illinois undoubtedly is that a consent decree has the same force and effect as a decree in invitum.

Knobloch v. Mueller, 123 Illinois 554; O'Connell v. Chicago Terminal R. R., 184 Ill. 308, 325." In Swift & Co. v. United States, 276 U. S. 311, the court adhered to the rule in the following language: "But 'a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause.' Nashville, Chattanooga & St. Louis Ry. Co. v. United States, 133 U. S. 261, 266. Compare United States v. Babbitt, 104 U. S. 767; McGowan v. Parish, 237 U. S. 285. Where, as here, the attack is not by appeal or by bill of review, but by a motion to vacate, filed more than four years after the entry of the decree, the scope of the enquiry may be even narrower."

Accordingly we conclude that under the decree of the Circuit Court of Cook County, Mrs. Smith became entitled to the corpus of the trust and that thereafter neither she nor any of the parties to that suit could deny the binding effect of the decree. Accordingly the new trust must rest upon its own ground and the rights of the petitioner must be determined thereunder.

The petitioner contends further, however, that the trust was a complete gift inter vivos; that the interests of the beneficiaries vested therein as of the date of its creation and were not conditioned upon the death of the deceased; that such a gift cannot be the basis of an estate tax based upon the amount of the estate of the deceased at the time of her death but that to include such a gift in her gross estate at the time of her death is in violation of the Fifth Amendment to the Constitution.

The applicable statute section 302 (c) of the Revenue Act of 1926 as amended by the Joint Resolution March 3, 1931, ch. 454, 46 Stat. 1516, U. S. C., Title 26, Sec. 411 (c) appears in the footnote.[1] This act was later amended in 1932, subsequent to the death of Mrs. Smith, but in view of our conclusions such amendment is immaterial. The immediate question, therefore, is whether under this act the corpus of the trust estate should be included in the amount of the gross estate in determining the estate tax.

The federal estate tax is an excise upon the transfer of a decedent's estate which takes place as the result of his death. The event which gives rise to the tax is the death of the decedent, with the resulting transfer of his estate, either by will or the laws relating to intestacy. Helvering v. St. Louis Union Trust Co., 296 U. S. 39, 41; Heiner v. Donnan, 285 U. S. 312, 322; May v. Heiner, 281 U. S. 238, 244; Nichols v. Coolidge, 274 U. S. 531, 537. It is not enough for the federal estate tax to attach that the transfer take effect before the death of decedent, but its taking effect must be dependent upon and in some way effectuated by his death. Shukert v. Allen, 273 U. S. 545. The

[1] The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. (U. S. C., Title 26, Sec. 411 (c).)

language of the Supreme Court's decisions indicates rather clearly that an irrevocable inter vivos transfer, not made in contemplation of death, with remainders vested, at the time of the transfer, in persons other than the transferor, but with a reservation to the transferor of the income during his lifetime is a transfer complete when made, is not one intended to take effect at his death and is not testamentary in character merely because of the reservation of a life estate.

In Levy v. Wardell, 258 U. S. 542, where stock was transferred under an agreement whereby the transferee agreed to pay all dividends to the transferor during his lifetime, the transferor retaining no other rights in the stock, the court held that the transfer was not intended to take effect in possession or enjoyment at or after the transferor's death, within the meaning of the law.

In Reinecke v. Northern Trust Company, 278 U. S. 339, the court similarly ruled, saying that "the shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made." It was thus established that for the death tax to attach, something must pass from settlor to beneficiary as a direct result of the settlor's death. Further enlightenment of just what is necessary is furnished by May v. Heiner, 281 U. S. 238, where, in dealing with an inter vivos trust, with a reservation of income in the donor for life, the court held that the property was not subject to the federal estate tax, notwithstanding the words of the statute, "in contemplation of or intended to take effect in possession or enjoyment at or after his death," saying:

"The transfer of October 1st, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event." Apparently the Supreme Court fixed as the determining test the question of whether the interests in the corpus of the property transferred are vested in the transferee at the time of the transfer or remain contingent until the time of the decedent's death. This rule was extended by the court to irrevocable transfers. Inter vivos, with reservation of income to the transferor for life in the following cases: Burnet v. Northern Trust Co., 283 U. S. 782; Morsman v. Burnet, 283 U. S. 783; McCormick v. Burnet, 283 U. S. 784.

In Coolidge v. Long, 282 U. S. 582, the court again held that the reservation of payment of income to the settlors during their lives did not operate to postpone the vesting in the remaindermen of the right of possession or enjoyment and that property so transferred could not constitutionally be taxed under a death-tax statute. This rule was followed in Binney v. Long, — U. S. —, 57 S. Ct. Rep. 206, where the court said:

"In Coolidge v. Long * * * it was held that the mere taking possession of that which had been vested in the beneficiaries for many years did not amount to a taxable occasion and constitutionally could not be so designated by the commonwealth in view of the complete vesting of the beneficiaries' estates in remainder at the date of the execution of the deed."

Again, in Helvering v. St. Louis Union Trust Co., 296 U. S. 39, the court said:

"When * * * Sec. 302 (c) includes within the purview of Sec. 301 (a) a transfer inter vivos 'intended to take effect in possession or enjoyment at or after his death,' it does so upon the theory that such a transfer in effect is testamentary—that is to say, a substitute for either a disposition by will or a passing in virtue of intestacy."

The court then quoted at length from the opinion in Heiner v. Donnan, 285 U. S. 312, to show that where no "interest in the property" involved in a given case passes "from the possession, enjoyment, or control of the donor at his death," there is no interest with respect to which the decedent has created a trust intended to take effect in possession or enjoyment at or after his death. Helvering v. Helmholz, 296 U. S. 93; Becker v. St. Louis Union Trust Co., 296 U. S. 48; Hodgkins v. Commissioner, 44 F. (2) 43 (CCA7) cert. denied 283 U. S. 825.

We conclude, therefore, that, as this trust was an irrevocable completed inter vivos gift; that, as the interests of the beneficiaries vested at the time of its creation, the estate of the deceased was thereafter deprived of the property passing to the trust estate and could no longer exercise control over the same; that, under the decisions quoted, such is not a testamentary transfer. It cannot be said, arbitrarily, to be in contemplation of death, for it does not depend upon the death of the transferor for creation of the rights of the beneficiaries. The language of the Supreme Court in Heiner v. Donnan, 285 U. S. 312, seems conclusive. There the court said:

"Section 301 of the Revenue Act of 1926 imposes a tax 'upon the transfer of the net estate of every decedent', etc. There can be no doubt as to the meaning of this language. The thing taxed is the transmission of property from the dead to the living. It does not include pure gifts inter vivos. The tax rests, in essence, 'upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested * * * it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties.' Knowlton v. Moore, 178 U. S. 41, 56, 57. The value of property transferred without consideration and in contemplation of death is included in the value of the gross estate of the decedent for the purposes of a death tax, because the transfer is considered to be testamentary in effect. Milliken v. United States, 283 U. S. 15, 23. But such a transfer, not so made, embodies

a transaction begun and completed wholly by and between the living, taxable as a gift (Bromley v. McCaughn, 280 U. S. 124), but obviously not subject to any form of death duty, since it bears no relation whatever to death. The 'generating source' of such a gift is to be found in the facts of life and not in the circumstance of death. And the death afterward of the donor in no way changes the situation; that is to say, the death does not result in a shifting, or in the completion of a shifting, to the donee of any economic benefit of property, which is the subject of a death tax. Chase Natl. Bank v. United States, 278 U. S. 327, 338; Reinecke v. Northern Trust Co., 278 U. S. 339, 346; Saltonstall v. Saltonstall, 276 U. S. 260, 271; nor does the death in such a case bring into being, or ripen for the donee or anyone else, so far as the gift is concerned, any property right or interest which can be the subject of any form of death tax. Compare Tyler v. United States, 281 U. S. 497, 503. Complete ownership of the gift, together with all its incidents, has passed during the life of both donor and donee, and no interest of any kind remains to pass to one or cease in the other in consequence of the death which happens afterward. * * * Whether the latter presumption (that such transfers were made in contemplation of death) be treated as a rule of evidence or of substantive law, it constitutes an attempt by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality. * * * This court has held more than once that a statute which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment."

See also Handy v. Delaware Trust Co., 285 U. S. 352.

To be sure some of these decisions were by a divided court, but it is not for us to question the correctness of the rules enunciated. Estate taxes are upheld as succession taxes upon property transferred in contemplation of death, but these decisions hold that such transfers as the one before us are not testamentary and that Congress may not declare something in contemplation of death which is not in fact such, Heiner v. Donnan, supra; and that it may not label a transfer as testamentary which is not testamentary and that it may not so designate an inter vivos gift, title under which vests in the beneficiaries at the time of the creation, irrespective of the decedent's death.

But the Government relies also upon the provision in the trust agreement that the decedent during her life time, but only after the death of her son's widow, had the right to alter or terminate the trust and to withdraw or demand possession of its corpus. This, it is said, destroys irrevocability and creates a contingency, and, therefore, prevents the present vesting of the estate in the beneficiaries. This question, we believe, is settled likewise by the decisions of the Supreme Court. Thus, in Klein v. United States, 283 U. S. 231, there was an inter vivos transfer by husband to wife of a life interest together with a remainder, contingent upon the transferee surviving the transferor. This was a contingent remainder and the court held that, inasmuch as there was no vested title, the tax was proper, the estate being contingent, with a possibility of reverter which was re-

moved by the death. In Helvering v. St. Louis Union Trust Co., 296 U. S. 39, and Becker v. St. Louis Union, 296 U. S. 48, the same test was applied. There was a reservation of a contingent possibility of reverter in the settlor of a trust, should the beneficiaries predecease him, but the court held that this did not make the transfer in trust one intended to take effect in possession or enjoyment at or after his death, for, since death put an end to the grantor's interest, the possibility of reverter no longer existed. Klein v. United States, 283 U. S. 321, was a case where the remainder was purely contingent. The court pointed out the differences in Heiner v. Donnan, 285 U. S. 312.

Again, in Helvering v. Wallace, 71 F. (2) 1002 (C. C. A. 2) the trust instrument created a life estate in the settlor, a remainder in the grantor's daughter and a possibility of reverter to the grantor. The court held that under the rule in May v. Heiner, supra, the death of the grantor was not the generating source of definite accession to the survivor's property rights but merely the obliteration of the decedent's life estate and that the decedent's rights were fixed and vested upon the execution of the trust instrument.

It seems obvious, therefore, that this trust worked a complete transfer of the title of the decedent at the time of the creation of the trust; that it was then a complete gift inter vivos and that the suggested possibility of reverter is not sufficient to destroy the complete character of the transaction.

We conclude, therefore, that the assessment of the deficiency tax was improper and the decision of the Board of Tax Appeals is

Reversed.

And on the same day, to wit, the 25th day of May 1937, the following further proceedings were had and entered of record, to wit:

Tuesday, May 25, 1937

Court met pursuant to adjournment before Hon. William M. Sparks, Circuit Judge; Hon. J. Earl Major, Circuit Judge; Hon. Walter C. Lindley, District Judge.

6120

SELLAR BULLARD, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF CLARA R. SMITH, DECEASED

vs.

COMMISSIONER OF INTERNAL REVENUE

Petition for Review of Decision of the United States Board of Tax Appeals

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decision entered in this cause on May 21, 1936, by the United States Board of Tax Appeals, be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said United States Board of Tax Appeals.

United States Circuit Court of Appeals for the Seventh Circuit

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 13, inclusive, contain a true copy of the stipulation filed on December 22, 1936, the hearing entered on May 11, 1937, the opinion by Lindley, J., filed May 25, 1937, and the judgment entered May 25, 1937, in the case of Sellar Bullard, as Executor Under the Last Will and Testament of Clara R. Smith, Deceased, vs. Commissioner of Internal Revenue, No. 6120, October Term, 1936, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 11th day of August A. D. 1937.

[SEAL]

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1937

Supreme Court of the United States

Order allowing certiorari

Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below, which accompanied the petition, shall be treated as though filed in response to such writ.

Mr. Justice BLACK took no part in the consideration and decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1937

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and regulations involved	2
Statement	2
Specification of errors to be urged	5
Reasons for granting the writ	6
Conclusion	10
Appendix	11

CITATIONS

Cases:	
Burnet v. *Northern Trust Co.*, 283 U. S. 782	7
Guaranty Trust Co. v. *Blodgett*, 287 U. S. 509	10
Helvering v. *City Bank Co.*, 296 U. S. 85	9
Keeney v. *New York*, 194 N. Y. 281, affirmed, 222 U. S. 525	10
May v. *Heiner*, 281 U. S. 238	7
McCormick v. *Burnet*, 283 U. S. 784	7
Milliken v. *United States*, 283 U. S. 15	9
Morsman v. *Burnet*, 283 U. S. 783	7
Tyler v. *United States*, 281 U. S. 497	9
United States v. *Wells*, 283 U. S. 102	9
Statutes:	
Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516 (U. S. C., Title 26, Sec. 411)	11
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 302, as amended (U. S. C., Title 26, Sec. 411)	11
Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 803 (U. S. C., Title 26, Sec. 411)	11
Miscellaneous:	
Cong. Record, Vol. 74, Part 7, pp. 7198–9	7, 8
Treasury Regulations 80, Art. 18	12

10701—37

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SELLAR BULLARD, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF CLARA R. SMITH, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered in the above cause on May 25, 1937, reversing a decision of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 134–148) is reported at 34 B. T. A. 243. The opinion of the Circuit Court of Appeals (R. 165–172) is reported at 90 F. (2d) 144.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 25, 1937 (R. 172). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent executed an irrevocable trust in 1932, reserving a life estate to herself. The question presented is whether Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of Congress, of March 3, 1931, and by Section 803 (a) of the Revenue Act of 1932, which purports to tax such a transfer, is constitutional.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved herein will be found in the Appendix, *infra*, pp. 11–13.

STATEMENT

In 1927, the decedent had three living children, one son and two daughters, all of whom were married (R. 135). Her son, Edward A. Smith, acted as her business manager. She relied upon his judgment, suggestions, and advice (R. 137).

On March 3, 1927, she established a trust, by which she transferred to her son various securities as trustee. The instrument provided that the income should be paid to the trustor during her life, and directed the trustee, upon her death, to

separate the corpus into three separate trusts, one for each of her children. The income from such separate trust for her son was to be paid to him for life, thereafter to his widow for life, unless a child survived him, in which case other disposition was to be made of the income and corpus. The separate trusts for each of the daughters provided for the distribution of income to them for life, and thereafter the income and corpus were to be distributed in a specified manner to their children or descendants (R. 136).

Edward died without issue on December 16, 1928, leaving a widow, Virginia Winslow Smith (R. 17, 137). In 1931 the decedent became dissatisfied with the trust created in 1927, by reason of the proposed investment policy of the successor trustee. She learned then that the trust was irrevocable, contrary to the representations made to her by her son in 1927, when it was executed (R. 21, 137). A bill in equity was prepared to declare the trust void on the ground of misrepresentation and fraud in the inducement (R. 21, 116–134, 138). In order to avoid family scandal, however, she was persuaded not to go through with the proceeding (R. 138).

Upon further examination of the instrument, it was discovered that the trust, in one respect at least, violated the rule against perpetuities. Accordingly, a bill in equity was prepared and filed in the Superior Court of Cook County, Illinois, on November 25, 1931, to declare the trust void (R.

50–64, 138). In answer to the bill, Virginia Winslow Smith denied that the trust was invalid (R. 87–89), but later consented to the entry of the desired decree, upon condition that a new trust would be executed, giving her the same rights which were purported to have been given her in the 1927 instrument (R. 138). The decree of the Illinois court was accordingly entered in 1932 (R. 98–107), declaring that the trust was "wholly inoperative, void, and of no effect", and that all the assets held by the trustee were the decedent's "own, absolute property, free and clear from any trust declared in said trust agreement and free and clear of any right, claim, or demand of the defendants" (R. 106).

Of the assets thus returned to the decedent, about two-thirds never became the subject of any other *inter vivos* trust. On February 17, 1932, the decedent created a trust out of the remaining one-third, directing the trustee to pay the income to the decedent for life, and upon her death the income to Virginia Winslow Smith for life, and upon the latter's death to pay over the corpus to the two daughters of the decedent in equal shares (R. 144).

Upon the decedent's death in 1933, the Commissioner determined that the corpus of the 1932 trust should be included in her gross estate, in accordance with the provisions of Section 302 (c) of the Revenue Act of 1926, which had been recently twice amended (March 3, 1931, and June 6, 1932) to

cover specifically the case of a transfer with the reservation of a life estate to the transferor. This determination of the Commissioner was approved by the Board of Tax Appeals (R. 134–148). Upon appeal, the Circuit Court of Appeals agreed with the Government that it was the 1932 trust, rather than the 1927 trust, which formed the basis for the tax, but decided that the tax was nevertheless invalid since there was "an irrevocable, completed, *inter vivos* gift" before the decedent's death, and that therefore the value of the property comprising the trust should not be included in the decedent's gross estate (R. 170).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 302 (c) of the Revenue Act of 1926, as amended by Joint Resolution approved March 3, 1931 (Pub., No. 131), and by Section 803 (a) of the Revenue Act of 1932, is contrary to and in violation of the Fifth Amendment to the Constitution of the United States.

2. In failing to hold that the corpus of the trust of February 17, 1932, is subject to Federal Estate Tax under Section 302 (c) of the Revenue Act of 1926, as amended by Joint Resolution approved March 3, 1931 (Pub., No. 131), and as further amended by Section 803 (a) of the Revenue Act of 1932.

3. In holding that the value of property transferred under an irrevocable deed of trust, under

the provisions of which the income from the property conveyed is reserved to the settlor for life, is not subject to the Federal Estate Tax under Section 302 (c) of the Revenue Act of 1926, as amended.

4. In reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court of Appeals, in holding invalid Section 302 (c) of the Revenue Act of 1926 as amended by the Joint Resolution of March 3, 1931, and likewise Section 803 (a) of the Revenue Act of 1932 (Appendix, *infra*), has decided an important question of constitutional law which calls for review by this Court.

From the beginning, the inclusion in the gross estate of decedents of transfers whereby the decedent retains for his life the possession of, or the income from, the property transferred has been regarded as an integral and necessary part of the estate tax. Prior to 1931 such transfers were regarded by administrative regulation as transfers "intended to take effect in possession or enjoyment at or after" the death of the transferor, within the language of the estate tax Act. See Regulations 37, Article 24; Regulations 63, Article 20; Regulations 68, Article 18; Regulations 70 (1926 ed.), Article 18. On May 2, 1931, however, this Court held in three cases that such transfers were not comprehended within the language of the statute.

Morsman v. *Burnet*, 283 U. S. 783; *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *McCormick* v. *Burnet*, 283 U. S. 784.[1] In each of these cases a *per curiam* opinion was delivered, stating that the question was one solely of statutory construction, "there being no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved * * *." 283 U. S. at 783, 784. On the day following these decisions Congress, upon the anxious suggestion of the Treasury Department, enacted the Joint Resolution here involved, amending Section 302 (c) of the Revenue Act of 1926 to include specifically transfers of the character here in question.

The prompt enactment of the Joint Resolution of March 3, 1931, was based upon a clear recognition of the importance of such a provision to a successful maintenance of the estate tax system. A letter from Ogden L. Mills, Acting Secretary of the Treasury, which was read in the House, stated (74 Cong. Rec., No. 7, p. 7198): "Without this amendment, the Federal estate tax will be seriously affected. It has been estimated that the effect of these Supreme Court decisions will be to cause a loss in excess of one-third of the revenue derived from the Federal estate tax, with anticipated refunds in excess of $25,000,000." The letter urged

[1] The decisions were on the authority of *May* v. *Heiner*, 281 U. S. 238. That case involved a transfer reserving an intermediate life estate to the grantor.

enactment of the resolution "in view of the character of these transfers and in order to prevent tax evasion."

The Chairman of the House Committee on Ways and Means, Mr. Hawley, expressed similar concern (74 Cong. Rec., Part 7, p. 7198):

> It had generally been considered that this provision of the statute covered cases such as those referred to above [*Morsman* v. *Burnet, supra; Burnet* v. *Northern Trust Co., supra; McCormick* v. *Burnet, supra*]. The Treasury Department had so construed the statute since the first Federal estate tax law in 1916 and its regulations so provide. * * *
>
> It is entirely apparent that if this situation is permitted to continue, the Federal estate tax will be seriously affected. Entirely apart from the refunds that may be expected to result, it is to be anticipated that many persons will proceed to execute trusts or other varieties of transfers under which they will be enabled to escape the estate tax upon their property. It is of the greatest importance therefore that this situation be corrected and that this obvious opportunity for tax avoidance be removed. It is for that purpose that the joint resolution is proposed.

The importance of the constitutional question which has been decided adversely to the Government by the court below is thus manifest.[2]

---

[2] The court below rejected respondent's contention that the termination of the earlier trust constituted full consideration to the grantor for the execution of the new trust, holding that the earlier trust was invalid. Should respond-

2. The decision of the court below is not only contrary to what appears to be the implication of the language quoted above from the *per curiam* opinions of this Court, but is inconsistent with principles of estate taxation which have been repeatedly declared by this Court and which were reviewed and applied as recently as *Helvering* v. *City Bank Co.*, 296 U. S. 85. It is settled that Congress may classify with testamentary transfers, for estate tax purposes, *inter vivos* transfers which are in the nature of substitutes for testamentary disposition. And as an adjunct to the taxation of testamentary transfers, Congress may tax transfers *inter vivos* which would otherwise be employed as a method of tax evasion. *Helvering* v. *City Bank Co., supra; Milliken* v. *United States,* 283 U. S. 15; *Tyler* v. *United States,* 281 U. S. 497; *United States* v. *Wells,* 283 U. S. 102, 116–117. A transfer with a reservation of a life estate in the grantor was, perhaps, the commonest method of escaping state death taxes, and in the light of that

---

ent's contention be renewed in this Court, we shall support the conclusion of the court below on this issue. If it should nevertheless be determined that the earlier trust was clearly valid, we shall maintain (a) that its termination did not constitute full consideration to the grantor, since the property conveyed in this earlier trust had remained part of the grantor's gross estate under an application of the Revenue Act of 1926 as amended; and (b) that such a retrospective application of the amended Act is not unconstitutional.

For present purposes, however, it is enough to observe that, unless reviewed, the decision below is a bar to the prospective application of the amended Act.

experience such transfers have generally been included in the measure of death taxes. See *Keeney* v. *New York*, 194 N. Y. 281, 287, affirmed, 222 U. S. 525. In the case of state death taxes such inclusion is valid beyond question. In *Guaranty Trust Co.* v. *Blodgett*, 287 U. S. 509, it was declared that prior statements of the Court sustaining the validity of such a tax under the Fourteenth Amendment express the "settled conviction of this court" (p. 513). The decision of the court below reaching a contrary result in respect of the Fifth Amendment is largely based, we submit, upon a misapplication of decisions which involved either retroactive taxation or questions of statutory construction. The decision below is thus in conflict with the *Guaranty Trust Co.* case, *supra*.

3. The Bureau of Internal Revenue advises that, if Congress is without power to include within the estate tax transfers of the sort here involved, the revenue from estate taxes during the present fiscal year will be reduced by approximately $45,000,000. It is impossible to estimate the amount of tax that will be involved in cases where the transferors are still living, but it is safe to say that it will be so large that the revenues of the Government will be seriously affected.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

AUGUST 1937.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) (As amended by the Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516.) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property, or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth. (U. S. C., Title 26, Sec. 411.)

(The language in italics represents the new matter added by the 1931 Amendment.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC 803. FUTURE INTERESTS.

(a) Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made

a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title." (U. S. C., Title 26, Sec. 411.)

* * * * *

Treasury Regulations 80:

ART. 18. *Transfers with possession or enjoyment retained.*—(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death", includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to

retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(b) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10:30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932. See section 506 of the Revenue Act of 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1937

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Specification of errors to be urged	5
Summary of argument	6
Argument:	
I. The amendmentatory provisions to Section 302 (c) of the Revenue Act of 1926 are valid as applied to the trust created in 1932	9
II. There is nothing in the connection between the 1932 trust and the abortive instrument of 1927 that could defeat the tax	27
Conclusion	33
Appendix	34

CITATIONS

Cases:	
American Express Co. v. *Caldwell*, 244 U. S. 617	23
Atl. & Pac. Tea Co. v. *Grosjean*, 301 U. S. 412	11
Bank of Commerce v. *Tennessee*, 161 U. S. 134	31
Billings v. *Illinois*, 188 U. S. 97	11
Braden Steel Corp. v. *Commissioner*, 78 F. (2d) 808	32
Bromley v. *McCaughn*, 280 U. S. 124	10
Burnet v. *Northern Trust Co.*, 283 U. S. 782	16
Burnet v. *Wells*, 289 U. S. 670	11, 13
Carbon Steel Co. v. *Lewellyn*, 251 U. S. 501	32
Chase Nat. Bank v. *United States*, 278 U. S. 327	22
Chicago Board of Trade v. *Olsen*, 262 U. S. 1	23
Coolidge v. *Long*, 282 U. S. 582	24
Corliss v. *Bowers*, 281 U. S. 376	13
Crooks v. *Harrelson*, 282 U. S. 55	30
Doe, Lessee of Poor v. *Considine*, 6 Wall, 458	26
Edwards v. *Slocum*, 264 U. S. 61	19
Everard's Breweries v. *Day*, 265 U. S. 545	23
Guaranty Trust Co. v. *Blodgett*, 287 U. S. 509	24
Hale v. *Bowler*, 215 Mass. 354	29
Hale v. *Iowa State Board*, No. 16, 1937 Term, decided November 8, 1937	31
Harding v. *Harding*, 198 U. S. 317	28
Hassett v. *Welch*, No. 375, 1937 Term	9, 15, 31

32767—37——1

Cases—Continued.

	Page
Heiner v. *Colonial Trust Co.*, 275 U. S. 232	31
Helvering v. *City Bank Co.*, 296 U. S. 85	7, 20, 24
Keeney, Matter of, 194 N. Y. 281, affirmed, 222 U. S. 525	11, 15, 24
La Belle Iron Works v. *United States*, 256 U. S. 377	11
Lambert v. *Yellowley*, 272 U. S. 581	23
Latty v. *Commissioner*, 62 F. (2d) 952	30
Magnano Co. v. *Hamilton*, 292 U. S. 40	11
May v. *Heiner*, 281 U. S. 238	16
McCormick v. *Burnet*, 283 U. S. 784	16
McGowan v. *Parish*, 237 U. S. 285	29
Milliken v. *United States*, 283 U. S. 15	7, 10, 12, 21
Millsaps College v. *Jackson*, 275 U. S. 129	31
Morsman v. *Burnet*, 283 U. S. 783	16
Muller v. *Oregon*, 208 U. S. 412	19
Nashville &c., Railway Co. v. *United States*, 113 U. S. 261	29
New York Trust Co. v. *Eisner*, 256 U. S. 345	10
Nicol v. *Ames*, 173 U. S. 509	11
Pacific Co. v. *Johnson*, 285 U. S. 480	31
Porter v. *Commissioner*, 60 F. (2d) 673, affirmed, 288 U. S. 436	12, 22, 30
Purity Extract Co. v. *Lynch*, 226 U. S. 192	23
Quong Wing v. *Kirkendall*, 223 U. S. 59	11
Re Denne [1927] 2 Dom. L. Rep. 717	18
Reinecke v. *Northern Trust Co.*, 278 U. S. 339	12
Ruppert, Jacob v. *Caffey*, 251 U. S. 264	23
Saltonstall v. *Saltonstall*, 276 U. S. 260	12
Southern Ry. Co. v. *United States*, 222 U. S. 20	23
Stafford v. *Wallace*, 258 U. S. 495	23
Stebbins v. *Riley*, 268 U. S. 137	19
Chas. C. Steward Machine Co. v. *Davis*, 301 U. S. 548	11
Swift & Co. v. *United States*, 276 U. S. 311	29
Taft v. *Bowers*, 278 U. S. 470	22
Tyler v. *United States*, 281 U. S. 497	21
United States v. *Babbitt*, 104 U. S. 767	29
United States v. *Wells*, 283 U. S. 102	12
Welch v. *Helvering*, 290 U. S. 111	30
Westfall v. *United States*, 274 U. S. 256	23
Y. M. C. A. v *Davis*, 264 U. S. 47	19
Statutes:	
Finance Act of 1894, 57 & 58 Vict., c. 30, Sec. 2 (3)	18
Finance Act of 1900, 63 & 64 Vict., c. 7, Part III, Sec. 11 (1)	18
Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516 (U. S. C., Title 26, Sec. 411 (c))	34
Pennsylvania, Laws 1826, c. 72, Sec. 1	15
Revenue Act of 1916, c. 463, 39 Stat. 756, Sec. 202	15
Revenue Act of 1918, c. 18, 40 Stat. 1057	16
Revenue Act of 1921, c. 136, 42 Stat. 227	16

Statutes—Continued.	Page
Revenue Act of 1924, c. 234, 43 Stat. 253	16
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 302 (U. S. C., Title 26, Sec. 411)	34, 35
Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 803 (U. S. C., Title 26, Sec. 411)	35
Succession Duty Act of 1853, 16 & 17 Vict., c. 51, Secs. 6, 7, 8	18
Miscellaneous:	
Cong. Rec., Vol. 74, Part 7:	
p. 7078	18
p. 7079	18
p. 7198	17
Regulations 37 (1919 Ed.), Art. 24	39
Regulations 37 (1921 Ed.), Art. 24	38
Regulations 63 (1922), Art. 20	38
Regulations 68 (1924), Art. 18	37
Regulations 70 (1926 Ed.), Art. 18	37
Regulations 70 (1929 Ed.), Art. 18	37
Regulations 80, Art. 18	36

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 349

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SELLAR BULLARD, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF CLARA R. SMITH, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 134–148) is reported in 34 B. T. A. 243. The opinion of the Circuit Court of Appeals (R. 165–172) is reported in 90 F. (2d) 144.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 25, 1937. (R. 172.) The petition for a writ of certiorari was filed August 25,

1937, and granted October 11, 1937. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent executed an irrevocable trust in 1932, reserving a life estate to herself. The question presented is whether the Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932 may constitutionally be applied to impose an estate tax with respect to a trust created after the enactment of the 1931 Resolution.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra,* pp. 34–39.

STATEMENT

The facts, which were found by the Board of Tax Appeals and appear in its opinion, are as follows:

In 1927, the decedent had three living children, one son and two daughters, all of whom were married. (R. 135.) Her son, Edward A. Smith, acted as her business manager. She relied upon his judgment, suggestions, and advice. (R. 137.)

On March 3, 1927, she attempted to establish a trust, by which she transferred to her son various securities as trustee. The instrument provided that the income should be paid to the settlor during her life, and directed the trustee, upon her death, to separate the corpus into three separate

trusts, one for each of her children. The income from the trust for her son was to be paid to him for life, thereafter to his widow for life, unless a child survived him, in which case other disposition was to be made of the income and corpus. The separate trusts for each of the daughters provided for the distribution of income to them for life, and thereafter the income and corpus were to be distributed in a specified manner to their children or descendants. (R. 136.)

Edward died without issue on December 16, 1928, leaving a widow, Virginia Winslow Smith. (R. 17, 137.) In 1931 the decedent became dissatisfied with the trust created in 1927, by reason of the proposed investment policy of the successor trustee. She learned then that the trust was irrevocable, contrary to the representations made to her by her son in 1927, when it was executed. (R. 20, 137.) A bill in equity was prepared to declare the trust void on the ground of misrepresentation and fraud in the inducement. (R. 21, 116–134, 138.) In order to avoid family scandal, however, she was persuaded not to go through with the proceeding. (R. 138.)

Upon further examination of the instrument, it was discovered that the trust, in one respect at least, violated the rule against perpetuities. Accordingly, a bill in equity was prepared and filed in the Superior Court of Cook County, Illinois, on November 25, 1931, to declare the trust void. (R. 50–64, 138.) In answer to the bill, Virginia Wins-

low Smith denied that the trust was invalid (R. 87–89), but later consented to the entry of the desired decree, upon condition that a new trust would be executed, giving her the same rights which were purported to have been given her in the 1927 instrument (R. 138). The decree of the Illinois court was accordingly entered in 1932 (R. 25, 98–107), declaring that the trust was "wholly inoperative, void, and of no effect", and that all the assets held by the trustee were the decedent's "own, absolute property, free and clear from any trust declared in said trust agreement and free and clear of any right, claim, or demand of the defendants" (R. 106).

Of the assets thus returned to the decedent, about two-thirds never became the subject of any other *inter vivos* trust. On February 17, 1932, the decedent created a trust out of the remaining one-third, directing the trustee to pay the income to the decedent for life, and upon her death the income to Virginia Winslow Smith for life, and upon the latter's death to pay over the corpus to the two daughters of the decedent in equal shares. (R. 144.)

Upon the decedent's death in 1933, the Commissioner determined that the corpus of the 1932 trust should be included in her gross estate, in accordance with the provisions of Section 302 (c) of the Revenue Act of 1926, which had been recently twice amended (March 3, 1931, and June 6, 1932) to cover

specifically the case of a transfer with the reservation of a life estate to the transferor. This determination of the Commissioner was approved by the Board of Tax Appeals. (R. 134–148.) Upon appeal, the Circuit Court of Appeals agreed with the Government that the 1932 trust "must rest upon its own ground" (R. 168), and that it is for the purpose of this case wholly independent of the 1927 trust. But it nevertheless decided that the tax could not be imposed with respect to the 1932 trust, since it was "an irrevocable completed inter vivos gift" made before the decedent's death. (R. 170.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 302 (c) of the Revenue Act of 1926, as amended by Joint Resolution approved March 3, 1931 (Public No. 131), and by Section 803 (a) of the Revenue Act of 1932, is contrary to and in violation of the Fifth Amendment to the Constitution of the United States.

2. In failing to hold that the corpus of the trust of February 17, 1932, is subject to Federal estate tax under Section 302 (c) of the Revenue Act of 1926, as amended by Joint Resolution approved March 3, 1931 (Public No. 131), and as further amended by Section 803 (a) of the Revenue Act of 1932.

3. In holding that the value of property transferred under an irrevocable deed of trust, under the

provisions of which the income from the property conveyed is reserved to the settlor for life, is not subject to the Federal estate tax under Section 302 (c) of the Revenue Act of 1926, as amended.

4. In reversing the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

I

The first Federal estate tax law was enacted in 1916. It required, *inter alia*, the inclusion in a decedent's gross estate of transfers "intended to take effect in possession or enjoyment at or after * * * death". That clause had appeared in the laws of at least forty States, going back, in the case of Pennsylvania, as far as 1826. Moreover, it had been uniformly construed by the courts of those States as including a transfer which reserved a life estate to the decedent. Such a transfer had been long regarded as a substitute for a testamentary transfer and had often been resorted to in attempts to defeat death taxes. The Treasury Department had similarly construed the Federal statute and the clause had been reenacted four times in the light of that administrative practice. However, on March 2, 1931, this Court in three cases construed the Federal legislation as not including transfers which reserved a life estate to the transferor. On March 3, 1931, Congress, upon the anxious suggestion of the Treasury Department, in order to pre-

vent tax avoidance, enacted the Joint Resolution amending Section 302 (c) of the Revenue Act of 1926 specifically to include such transfers. It is pursuant to that amendment (as further amended in 1932) that the present tax is being asserted.

The prompt enactment of the Joint Resolution, the statements made to the Senate and the House by the Chairmen of the Finance and Ways and Means Committees respectively, the letter from the Acting Secretary of the Treasury which was read to the House—all these show that the March 3, 1931, amendment was based upon a clear recognition of the importance of such a provision to the successful maintenance of the estate tax system. Accordingly, since it is entirely appropriate for Congress to classify with property actually passing at death, certain *inter vivos* transfers that may have been made as substitutes for testamentary dispositions or made in order to defeat the estate tax (*Helvering* v. *City Bank Co.*, 296 U. S. 85; *Milliken* v. *United States*, 283 U. S. 15), we submit that the statute assailed here is a valid exercise of legislative power.

II

The tax here is being asserted with respect to the trust executed in 1932. The Circuit Court of Appeals ruled, and in this respect we support its decision, that the 1932 trust "must rest upon its own ground", independent of the 1927 instrument.

First, the 1927 trust was held by an Illinois court

of competent jurisdiction to be "wholly inoperative, void, and of no effect", and the assets held by the trustee thereunder were declared to be the decedent's "own absolute property, free and clear from any trust". Although that decree had been entered pursuant to the consent of the parties, it was nevertheless correct and binding upon them. Therefore, the corpus of the 1932 trust never had been subject to the provisions of the attempted trust of 1927, and any contention based upon the relationship between the two instruments must fail.

Second, even if the invalidity of the 1927 trust were open to dispute, the relinquishment of any claim thereunder was not sufficient to exempt the 1932 trust from the operation of Section 302 (c) as a "bona fide sale for an adequate and full consideration in money or money's worth". Not only was the transaction not a "sale" as that word is commonly understood, but there certainly was not an "adequate *and full*" consideration, since the release of a disputed (and probably invalid) claim to certain property interests in exchange for undisputed interests of the same magnitude is undoubtedly not *full* consideration. Moreover, the consideration was not "in money or money's worth". Finally, petitioner's position depends at most upon a series of doubtful constructions of the statute in his favor; but the rule is firmly settled that where an exemption from taxation is sought,

the statute must be construed most strongly against the one claiming it.

Third, even if the 1927 trust were entirely valid and even if the 1932 trust must be deemed to have derived its vitality from the 1927 trust, the tax is still proper. Had the decedent elected not to change the 1927 trust, it would have been included in her gross estate. See our brief in *Hassett* v. *Welch*, No. 375, present Term. Accordingly, the mere *substitution* of a new trust at a time when the earlier one was prospectively a part of the grantor's estate, is not based upon such consideration as comes within the exemption provision in Section 302 (c).

ARGUMENT

I

THE AMENDATORY PROVISIONS TO SECTION 302 (C) OF THE REVENUE ACT OF 1926 ARE VALID AS APPLIED TO THE TRUST CREATED IN 1932

Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931 (Appendix, *infra*, pp. 34–35), provides that there shall be included in the gross estate the value of any property of which the decedent has at any time made a transfer, by trust or otherwise, under which he has retained—

> for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property, or (2) the right to designate the persons who shall

possess or enjoy the property or income therefrom.

Section 302 (c) was further amended by Section 803 of the Revenue Act of 1932, but not in any respect material here.

In the instant case the decedent, in 1932, transferred in trust, certain property, but retained for her life the enjoyment of the income therefrom. Thus, the transfer comes within the precise language of the statute and should therefore be included in the gross estate, unless, as the court below held, the statute, as amended, is unconstitutional.[1]

1. There is no doubt of the power of Congress to impose estate taxes generally. *New York Trust Co.* v. *Eisner,* 256 U. S. 345. Nor is there any doubt that Congress may impose a tax upon *inter vivos* gifts. *Bromley* v. *McCaughn,* 280 U. S. 124. The only question then is whether, in imposing an estate tax, Congress may under specified circumstances require the inclusion of certain *inter vivos* transfers in the gross estate. This is merely a question of *classification* under the Fifth Amendment. See *Milliken* v. *United States,* 283 U. S. 15, 20.

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[1] In the court below, respondent took the position that the 1932 trust was not comprehended within the terms of the statute by reason of its relationship to the attempted trust of 1927. The court below rejected that argument, and we believe rightly so. However, in the event that respondent may ask to renew that contention in this Court, we consider it in detail in Point II, *infra,* pp. 27–33.

How broad the scope of a state's power to classify may be without running afoul of the Fourteenth Amendment, we need hardly discuss. Random examples are furnished by *Atl. & Pac. Tea Co.* v. *Grosjean,* 301 U. S. 412, *Keeney* v. *New York,* 222 U. S. 525, and *Billings* v. *Illinois,* 188 U. S. 97. The test is always whether the classification is so arbitrary, so capricious, so devoid of any reasonable basis that it must be declared invalid. Moreover, since the restraints upon a state's power under the Fourteenth Amendment rest not only upon the due process clause but also upon the equal protection clause, the latitude permissible to *Congress* under the Fifth Amendment, which contains no equal protection clause, is subject to limitations "less narrow and confining". See *Chas. C. Steward Machine Co.* v. *Davis,* 301 U. S. 548, 584; *LaBelle Iron Works* v. *United States,* 256 U. S. 377, 392; *Quong Wing* v. *Kirkendall,* 223 U. S. 59, 62. And the usually strong presumption in favor of the validity of an act of Congress is "particularly true of a revenue act of Congress". *Nicol* v. *Ames,* 173 U. S. 509, 515. Compare *Burnet* v. *Wells,* 289 U. S. 670, 677–678; *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44.

2. We submit that in this case there is a valid basis for the classification, namely, that a transfer which reserves to the transferor the possession or enjoyment during his life, i. e., a life estate, operates as a reasonable substitute for a testamentary

transfer, and as such may properly be classified with transfers of property vesting in interest at death.

The Federal estate tax seeks to reach not only property passing at death, but also transfers intended as substitutes for testamentary dispositions. Probably, the most familiar of these is the gift in contemplation of death. It is included in the gross estate even though it be irrevocable, and even though it may have been made and completed many years before the donor's death. Although "nothing passes at death", the transfer is taxed as a part of the gross estate, because it is a *reasonable substitute for a testamentary disposition,* and as such may properly be classified with property actually passing at death. See *Milliken* v. *United States,* 283 U. S. 15, 20; *United States* v. *Wells,* 283 U. S. 102. The due process clause of the Fifth Amendment is not offended by such a classification, since the *inter vivos* transfer bears a reasonable relationship to death transfers.

Similarly, an *inter vivos* transfer in which a power of revocation is reserved may be included in the measure of the donor's gross estate. *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339. Cf. *Porter* v. *Commissioner,* 288 U. S. 436; *Saltonstall* v. *Saltonstall,* 276 U. S. 260. The reservation of such control and the termination thereof at the settlor's death is the element that transforms an otherwise non-testamentary transfer into one that has a def-

inite relationship to gifts at death. But the reservation of such control *is not the only element* that may justify the tax. For as we have seen, an irrevocable gift, if made in contemplation of death, may likewise be included in the decedent's gross estate. The important thing is this: Both are testamentary in character, one is testamentary because of the reserved power, the other by reason of the inherent nature of the gift.

Accordingly, Congress may require the inclusion of an *inter vivos* transfer in the donor's gross estate if it bears any reasonable relationship to a testamentary disposition; and that relationship may exist *either* because there are reserved powers in the donor which terminate at his death, *or* because the gift has other characteristics that justify its being considered a substitute for a testamentary disposition.[2]

The pivotal question, therefore, is whether there is anything about the disputed transfer that renders it an appropriate substitute for a testamentary transfer. And it is the Government's position that where the decedent has reserved a life estate, the transfer partakes sufficiently of a testamentary

[2] A similar situation exists in the field of income taxation. In addition to taxing income to the one who receives it, Congress may tax (a) the grantor of a revocable trust (*Corliss* v. *Bowers*, 281 U. S. 376) because of his power to control the income; or (b) it may tax the grantor of an irrevocable trust, if under appropriate circumstances the trust performs a function for him that might normally be performed by the use of his own income (*Burnet* v. *Wells*, 289 U. S. 670).

disposition to justify the classification. By retaining the *enjoyment* of the property until the date of her death, the decedent could reasonably feel that she was making, through the trust, a disposition of property that she might otherwise accomplish by will.[3]

3. The events leading up to the enactment of the Joint Resolution of March 3, 1931, which specifically imposes a tax upon a transfer such as the trust involved herein, are of the utmost significance in disclosing the basis for the classification of such trusts along with other transfers of a testamentary nature. Those events show plainly that Congress understood this type of transfer as being particu-

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[3] The very facts of this case fortify this conclusion. The corpus of the 1932 trust came from the attempted trust of 1927. The 1927 instrument divided the property into three parts. The 1932 trust dealt only with one of those parts, the other two-thirds being retained by the decedent, and the provisions in respect to the two-thirds were roughly incorporated in a will which the decedent executed about the same time as the creation of the 1932 trust. (R. 72–78, paragraphs "Sixth" and "Seventh".) She would have liked to treat the remaining one-third similarly by will, but in view of the opposition of her daughter-in-law, she was compelled to achieve the same result through the trust device. Surely this was intended, and reasonably so, as a substitute for a testamentary disposition.

The 1932 trust also reserved to the decedent during her lifetime, but only after the death of her daughter-in-law, the right to alter, change or amend the trust and to withdraw all or any portion of the corpus. (R. 143.) While we are not making any independent argument based upon this reserved right, it nevertheless fortifies the characterization of the trust as a substitute for a testamentary disposition.

larly suitable as a substitute for a testamentary transfer, and that the provisions were enacted in order to stop tax avoidance.

This background is set forth in detail in our brief in *Hassett* v. *Welch*, No. 375, present Term, pp. 19–28. The history there recounted shows that the first Federal estate tax law, which was enacted in 1916, undertook to tax as part of a decedent's estate not only transfers made "in contemplation of" death, but also transfers "intended to take effect in possession or enjoyment at or after" death. Section 202 (b) of the Revenue Act of 1916, c. 463, 39 Stat. 756. The latter clause was not novel. It appeared in substantially the same form ninety years before in the death tax statute of Pennsylvania, Laws 1826, c. 72, Sec. 1. When the Federal estate tax was first imposed in 1916, that clause had been incorporated into the death tax laws of at least forty States. And such state courts as were called upon to deal with that clause both before and after the enactment of the 1916 Act, have, in an almost overwhelming number of cases, treated it as including a transfer in which the decedent had retained a life estate. Indeed, such a transfer was regarded as the leading type of gift "intended to take effect in possession or enjoyment at or after death." As the Court of Appeals of New York said in *Matter of Keeney*, 194 N. Y. 281, 287 (affirmed, 222 U. S. 525):

> It is true that an ingenious mind may devise other means of avoiding an inheritance tax,

but the one commonly used is a transfer with reservation of a life estate. (Italics supplied.)

The Treasury Department repeatedly gave the Federal statute the same construction, and in the light of those interpretations Congress reenacted that clause in the Revenue Acts of 1918, c. 18, 40 Stat. 1057; 1921, c. 136, 42 Stat. 227; 1924, c. 234, 43 Stat. 253, and 1926, c. 27, 44 Stat. 9 (the last basic estate tax statute).

On March 2, 1931, however, this Court held in three cases that such transfers were not comprehended within the language of the statute. *Morsman* v. *Burnet,* 283 U. S. 783; *Burnet* v. *Northern Trust Co.,* 283 U. S. 782; *McCormick* v. *Burnet,* 283 U. S. 784.[4] In each of these cases a *per curiam* opinion was delivered, stating that the question was one solely of statutory construction, "there being no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved * * *". 283 U. S. at pp. 783, 784. On the day

[4] The decisions were on the authority of *May* v. *Heiner,* 281 U. S. 238. That case did not involve a retention of possession or enjoyment by the grantor, but rather gave an immediate life estate to a third person, with a life estate thereafter to the grantor, and then remainders over. Since in that case the grantor might never come into possession or enjoyment of the property before death, the Treasury Department had not, until those three decisions, regarded *May* v. *Heiner* as determinative of the question presented in those cases.

following these decisions Congress, upon the anxious suggestion of the Treasury Department, enacted the Joint Resolution here involved, amending Section 302 (c) of the Revenue Act of 1926 to include specifically transfers of the character here in question.

The prompt enactment of the Joint Resolution of March 3, 1931, was based upon a clear recognition of the importance of such a provision to the successful maintenance of the estate tax system. A letter from Ogden L. Mills, Acting Secretary of the Treasury, which was read in the House, stated (Cong. Rec., Vol. 74, Part 7, p. 7198): "Without this amendment, the Federal estate tax will be seriously affected. It has been estimated that the effect of these Supreme Court decisions will be to cause a loss in excess of one-third of the revenue derived from the Federal estate tax, with anticipated refunds in excess of $25,000,000." The letter urged enactment of the resolution "in view of the character of these transfers and in order to prevent tax evasion."

The Chairman of the House Committee on Ways and Means, Mr. Hawley, expressed similar concern (Cong. Rec., Vol. 74, Part 7, p. 7198):

> It had generally been considered that this provision of the statute covered cases such as those referred to above [*Morsman* v. *Burnet, supra; Burnet* v. *Northern Trust Co., supra; McCormick* v. *Burnet, supra*]. The Treasury Department had so construed

> the statute since the first Federal estate tax law in 1916 and its regulations so provide. * * *
>
> It is entirely apparent that if this situation is permitted to continue, the Federal estate tax will be seriously affected. * * * It is of the greatest importance therefore that this situation be corrected and *that this obvious opportunity for tax avoidance be removed.* It is for that purpose that the joint resolution is proposed. [Italics supplied.]

Like representations were made to the Senate by the Chairman of the Finance Committee, Senator Smoot. Cong. Rec., Vol. 74, Part 7, pp. 7078–7079.

Accordingly, it is clear that Congress understood these provisions as an integral part of a system of Federal death taxes. That this type of transfer might be resorted to in order to defeat the estate tax appeared from the precautionary steps to thwart such avoidance taken by the legislatures in the death tax statutes, not only in forty of our States,[5] but in Canada[6] and England[7] as well. The action of those legislatures is, we submit, additional cogent evidence as to the reasonableness of

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[5] See pp. 20–22, Government's brief in No. 375.

[6] See *Re Denne*, [1927] 2 Dom. L. Rep. 717.

[7] Cf. the Succession Duty Act of 1853, 16 & 17 Vict., c. 51, Secs. 6, 7, and 8; the Finance Act of 1894, 57 & 58 Vict., c. 30, Sec. 2 (3); the Finance Act of 1900, 63 & 64 Vict., c. 7, Part III, Sec. 11 (1).

the classification made by Congress.* Cf. *Muller* v. *Oregon*, 208 U. S. 412, 419–421.

4. Therefore, we submit that Congress was plainly justified in making the classification. It reasonably anticipated that such transfers might be made to avoid estate taxes, and it had ample power to prevent such avoidance. The principle that an Act of Congress may be valid as being reasonably necessary and proper to the exercise of the taxing power is not open to serious challenge.

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*The state statutes and decisions are not to be distinguished in this connection upon the ground that most of them involved legacy or succession taxes rather than estate taxes. It is true that the former impinge upon the "receiving" end of the transfer while the latter are imposed upon the "giving" end. And it is also true that many vital factors may depend upon which kind of death tax is being imposed, as, for example, where, as between different legatees, the burden of the tax is to fall. *Y. M. C. A.* v. *Davis*, 264 U. S. 47. Cf. *Edwards* v. *Slocum*, 264 U. S. 61; *Stebbins* v. *Riley*, 268 U. S. 137.

But the question whether a given *inter vivos* transfer is of such character that it might be made in substitution for a gift by will, is the same under both types of death tax. Thus the test of "contemplation of death" is substantially the same under both types, and such transfers may be taxed under either type of statute as transfers reasonably related to the basic tax in the statute. Similarly here, the test is whether the transfer involved is of such character as might reasonably be classified with transfers made at death. This inquiry is not advanced by considering whether anything "passes at death", but rather the true test is, as in the case of gifts made in contemplation of death, whether the transfer subserves to the transferor a purpose that he might normally accomplish through a will.

In *Helvering* v. *City Bank Co.*, 296 U. S. 85, this Court upheld the validity of Section 302 (d) of the Revenue Act of 1926, which provides for the inclusion in the gross estate of property which the decedent has transferred retaining the power, either alone or in conjunction with any person, to alter, amend, or revoke. It was contended in vain that the statute was arbitrary as applied to a transfer in which the consent to revoke must come from the transferee himself. The Court sustained the constitutionality of that provision on the ground that it was reasonably deemed necessary to prevent tax avoidance (p. 90):

> The respondent insists that a power to recall an absolute and complete gift only with the consent of the donee is in truth no power at all; that in such case the so-called exercise of the power is equivalent to a new gift from the donee to the donor. And so it is claimed that the statute arbitrarily declares that to exist which in fact and law is nonexistent. The position is untenable. The purpose of Congress in adding clause (d) to the section as it stood in an earlier act was *to prevent avoidance* of the tax by the device of joining with the grantor in the exercise of the power of revocation someone who he believed would comply with his wishes. Congress may well have thought that a beneficiary who was of the grantor's immediate family might be amenable to persuasion or be induced to consent to a revocation in consideration of other expected benefits from the grantor's

> estate. *Congress may adopt a measure reasonably calculated to prevent avoidance of a tax.* [Italics supplied.]

Again, in *Milliken* v. *United States,* 283 U. S. 15, the Court found at least partial support for the validity of the tax on gifts in contemplation of death in the fact that the measure was an appropriate adjunct to the estate tax law, saying (p. 24):

> Further, as an appropriate and indeed necessary measure to secure the effective administration of a system of death taxes, we think the present tax is to be supported as an incident and in aid of the exercise of the constitutional power to levy a tax on the transfer of the decedent's estate at death.

Similarly, in *Tyler* v. *United States,* 281 U. S. 497, the Court again relied upon the adjunct theory in upholding the inclusion in a decedent's gross estate of the *entire* value of property held by the entirety. The Court said (p. 505):

> The evident and legitimate aim of Congress was to prevent an avoidance, in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it; and the provision under review *is an adjunct of the general scheme of taxation* of which it is a part, entirely appropriate as a means to that end. [Italics supplied.]

In like manner, the Court upheld the inclusion in a decedent's gross estate of the proceeds of life in-

surance policies. *Chase Nat. Bank* v. *United States,* 278 U. S. 327. Although the insured had retained powers to surrender the policies for cash and to change the beneficiaries, it was clear that at the moment immediately preceding his death, the cash value of those policies was considerably less than aggregate face amount of the policies. Thus, even though it was plain that the *entire* amount taxed did not "pass from" the decedent at the time of death, yet by virtue of the close similarity of such life insurance to testamentary transfers, the tax was sustained.

Again, in *Porter* v. *Commissioner,* 288 U. S. 436, it was clear that while the grantor had reserved the power to modify the trust, nothing passed *from his estate* at the time of death, since he did not reserve the right to modify the trust in his own favor. The tax was nevertheless upheld. "The net estate upon the transfer of which the tax is imposed, is not limited to property that passes from decedent at death." *Id.,* p. 443.

In *Taft* v. *Bowers,* 278 U. S. 470, the Court sustained a provision requiring the donee of property to use the donor's cost (or other basis) in measuring the taxable gain from the subsequent sale of such property. Although it was there contended that the gain computed in that manner did not accurately reflect the donee's income, the provision was nevertheless upheld as being "entirely appropriate for enforcing a general scheme of lawful taxation" (p. 482).

The decisions of this Court outside the field of taxation likewise demonstrate that Congress may take reasonable steps to implement an exercise of Federal power. *Everard's Breweries* v. *Day*, 265 U. S. 545; *Lambert* v. *Yellowley*, 272 U. S. 581, 594; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264; *Stafford* v. *Wallace*, 258 U. S. 495, 513; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Southern Ry. Co.* v. *United States*, 222 U. S. 20; *American Express Co.* v. *Caldwell*, 244 U. S. 617; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; *Westfall* v. *United States*, 274 U. S. 256, 259.

5. We have endeavored to show that Congress was justified in assuming that a trust reserving a life estate to the grantor might be used as a substitute for a testamentary disposition, and that therefore, in order to prevent tax avoidance, it was further justified in requiring such transfers to be taxed as testamentary dispositions. We believe, therefore, that we have already established the validity of the challenged provisions.

The great and underlying fallacy of the contrary view is the contention that "something must pass at death" before the transfer can be taxed. It is true that where "something *does* pass at death", or where there is a shifting of economic interests at death (as in the case of an *inter vivos* transfer reserving a power of revocation), then that fact alone justifies the tax. But the converse is not true. For, there may be a tax even though no interest

passes at death, as in the case of a gift in contemplation of death, or as in the case of such a transfer as was involved in *Helvering* v. *City Bank Co.*, 296 U. S. 85. The important thing is whether, under all the circumstances, Congress could reasonably regard the transfer either as an actual testamentary disposition or as one that might be made as a substitute therefor.

Any doubt as to the application of these principles to the present situation must be dispelled by the decision of this Court in *Guaranty Trust Co.* v. *Blodgett*, 287 U. S. 509. There, an irrevocable trust reserving to the grantor a life interest was held constitutionally subject to the Connecticut death tax statute. It was assumed that the remainders were vested in interest at once upon the creation of the trust. But this Court approved the state court's "distinction between taking effect in possession or enjoyment and vesting in right, title or interest * * *" (p. 512), and held that the tax was not violative of the Fourteenth Amendment. A like result had been reached some years before in *Keeney* v. *New York*, 222 U. S. 525.* See also *Coolidge* v. *Long*, 282 U. S. 582, 596.

Respondent may perhaps contend that those cases have no bearing here since we are now dealing with an estate tax, whereas inheritance taxes were there involved. But, although there may be many

*In that case there was, in addition, a power to revoke upon six months' notice, but it did not appear to play any part in the Court's decision.

vital differences between these two types of death taxes (see footnote 8, *supra*, p. 19), they are both, nevertheless, *death* taxes. In the one the tax falls upon the *transmitting* end of the transfer, in the other upon the *receiving* end. In both, however, the transfer must be testamentary in character. Thus, gifts made in contemplation of death are taxed under both types of death taxes, and the question is not whether something has passed from the donor at time of death (in the case of estate taxes), nor whether something has been received at the donor's death by the recipient (in the case of inheritance taxes). The critical factor in both situtions is whether there has been a substitute for a testamentary gift. And a holding that a certain *inter vivos* transfer is sufficiently related to a transfer at death that a legislature may consistently with due process require it to be so classified, is a holding that applies to both types of death taxes.

6. Thus far we have contended that Congress may classify *inter vivos* transfers with gifts at death, if the *inter vivos* transfers have any reasonable relation to or may reasonably be considered as substitutes for testamentary dispositions; and that an *inter vivos* trust in which the settlor has reserved full possession or enjoyment until death is such an *inter vivos* transfer. It has thus been unnecessary to argue that property has "passed" at death. But we do not mean to imply or concede

that nothing has passed at death here. For, property which had previously been enjoyed by the settlor, is at her death for the first time enjoyable by the remainderman.

Although the remainderman's interest may become "vested" at once upon the creation of the trust, his enjoyment is postponed. "A vested remainder is where a *present* interest passes to *a certain and definite* person, but to be enjoyed *in futuro.*" *Doe, Lessee of Poor* v. *Considine,* 6 Wall. 458, 474.

The death of the settlor therefore does terminate the life interest and frees the property for the remainderman. There is in reality a factual transfer at death. What was formerly merely a right with respect to the property has ripened by virtue of the grantor's death into the full and complete enjoyment of the property itself. The remainder interest before death was something far less substantial than the property itself. Indeed, the amount for which the remainder could be sold in the market at the time the trust was created was probably considerably less than the value of the property itself. In a very real sense, therefore, the settlor's death has effected a "passing" of property and a shifting of enjoyment at that time. There has been a genuine enlargement of the remainderman's rights by the death of the life tenant. And we believe that Congress should be

able to impose a tax upon such a shifting of interests and rights at death.

However, it is not necessary for us to pitch our case upon this ground. Our primary position rests upon the broader contention that, even assuming that nothing has passed at death, this is the type of *inter vivos* transfer that may be classified with testamentary dispositions.

II

THERE IS NOTHING IN THE CONNECTION BETWEEN THE 1932 TRUST AND THE ABORTIVE INSTRUMENT OF 1927 THAT COULD DEFEAT THE TAX

The court below held that the 1927 trust plays no part in this controversy and that the 1932 trust "must rest upon its own ground." (R. 168.) With this we fully agree. However, in the event that respondent may renew his contentions that the relationship between the two instruments operates to relieve the estate of this tax liability, we now make the following anticipatory answers in support of that conclusion of the court below.

First. Respondent may contend that since decedent's daughter-in-law consented to the formal termination of the 1927 trust, such circumstances constitute a "bona fide sale for an adequate and full consideration in money or money's worth," and therefore the 1932 trust is not even within the purview of Section 302 (c).

However, the 1927 instrument was void, at least as to that third which formed the basis for the 1932 trust. For, with respect to the one-third allocable to decedent's son, the instrument attempted to create interests that might not vest within lives in being plus twenty-one years. The facts upon which this third of the 1927 trust violated the rule against perpetuities are fully set forth in the decree of the Illinois court at pages 101–103 of the record herein. Whether the invalidity of that one-third was sufficient to render the other two-thirds void also, is a nice question, but not important here, since the 1932 trust involved in this proceeding arises solely from that one-third of the 1927 trust that was clearly invalid.[10]

While it is true that the decree of the Illinois court was entered pursuant to the consent of the parties, that fact does not detract from its correctness. The invalidity of the one-third of the 1927 trust under the rule against perpetuities is patent. And furthermore, a consent decree may be as binding and conclusive as any other. See *Harding* v. *Harding*, 198 U. S. 317, where this Court said (p. 335):

> The general rule in Illinois undoubtedly is that a consent decree has the same force

[10] The Illinois court, however, declared that since under the circumstances decedent would not have created any part of the 1927 trust if she had known that the portion for her son would be invalid, the entire trust was void. (R. 102–103.)

and effect as a decree *in invitum*. *Knobloch* v. *Mueller*, 123 Illinois, 554; *O'Connell* v. *Chicago Terminal R. R.*, 184 Illinois, 308, 325.

Cf. *Swift & Co.* v. *United States*, 276 U. S. 311; *McGowan* v. *Parish*, 237 U. S. 285, 295; *Nashville, &c., Railway Co.* v. *United States*, 113 U. S. 261, 266; *United States* v. *Babbitt*, 104 U. S. 767.

Accordingly, as the decree of the Illinois court declared, the 1927 trust (or at least that one-third which formed the basis for the 1932 trust) was "wholly inoperative, void, and of no effect" and the assets held by the trustee were the decedent's "own absolute property, free and clear from any trust". (R. 106.) Therefore, the corpus of the 1932 trust never had been subject to the provisions of the attempted trust of 1927, and those designated as beneficiaries in the earlier instrument had no claim whatever against those assets. Under these circumstances, the contention that there was the requisite consideration for the 1932 trust to remove it from the scope of Section 302 (c) is, we submit, without foundation.[11] Cf. *Hale* v. *Bowler*, 215 Mass. 354.

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[11] The contention of respondent, made below, that those designated as beneficiaries under the 1927 trust, rather than the decedent, were the real settlors of the 1932 trust, is merely a different version of the point we have just discussed, and what we have said with respect thereto disposes of this contention as well.

Second. Even if the validity of the one-third of the 1927 trust were open to dispute, there still has not been a compliance with the exemption requirements of Section 302 (c). An exemption is given only where there is a "bona fide sale for an adequate and full consideration in money or money's worth".

Upon the assumption that there might have been a disputed claim against the 1927 trust, its relinquishment certainly was not a compliance with the exemption requirements. While it is true that a promise to give up a disputed claim may operate technically as a valid "consideration" under the law of contracts, what is called for here is far more than that.

Not only was the transaction not a "sale" as that term is ordinarily used, but the consideration required by the statute must be "adequate *and full*" [italics supplied]. This is stated in the conjunctive and must be so construed. Cf. *Crooks* v. *Harrelson,* 282 U. S. 55; *Welch* v. *Helvering,* 290 U. S. 111. The release of a disputed (and probably invalid) claim in exchange for an *undisputed* estate of the same magnitude can hardly be said to be "*full* consideration". And beyond all doubt, it certainly was not in "money or money's worth". Cf. *Porter* v. *Commissioner,* 60 F. (2d) 673 (C. C. A. 2d), affirmed as to another point, 288 U. S. 436; *Latty* v. *Commissioner,* 62 F. (2d) 952 (C. C. A. 6th).

Thus it appears that respondent's claim to an exemption from taxation here rests, at most, upon a series of highly dubious interpretations of nearly each word in the exemption clause. But the rule is well settled that an exemption is to be strictly construed against the one claiming it. What this Court said in *Bank of Commerce* v. *Tennessee,* 161 U. S. 134, is particularly pertinent here (p. 146):

> There must be no doubt or ambiguity in the language used upon which the claim to the exemption is founded. It has been said that a well founded doubt is fatal to the claim; * * *.

See also *Hale* v. *Iowa State Board,* No. 16, 1937 Term, decided November 8, 1937; *Pacific Co.* v. *Johnson,* 285 U. S. 480, 491; *Millsaps College* v. *Jackson,* 275 U. S. 129, 132; *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232.

Third. But even if the 1927 trust had been wholly valid, and even though the interests created in the 1932 trust must be traced back to the earlier instrument, there has still been a failure to come within the exemption in Section 302 (c).

The 1927 trust itself had been created without any consideration. And in that trust decedent reserved the income to herself for life. Accordingly, had she permitted it to continue until her death, the corpus of that trust would have been included in her gross estate. See Government's brief in *Hassett* v. *Welch,* No. 375, present Term.

Respondent's contention would then come to this: That by relinquishing rights under an existing trust already includable in the settlor's gross estate on condition that the settlor execute a new trust embodying substantially the same provisions, the settlor and beneficiaries together without really giving up anything could defeat the operation of the estate tax. We submit that this is not only fantastic but, if sustained, would emasculate the provisions in Section 302 (c) requiring a tax on a transfer with a reserved life interest. It would be hardly more than a trifling matter for the settlor and beneficiaries to get together in any case and execute a new trust in identical or substantially identical terms as the old, merely upon condition that each relinquish his rights under the old. It seems clear, therefore, that Congress did not intend the exemption to apply under such circumstances. Cf. *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501, 504; *Braden Steel Corp.* v. *Commissioner*, 78 F. (2d) 808, 810 (C. C. A. 10th).

The rule exempting a transfer of property when there has been adequate and full consideration is based upon the theory that the property, which would prospectively form a part of the decedent's estate, is being replaced by other property and therefore the total taxable estate is not being diminished by such a transfer. But if exemption were applied here it would diminish the gross estate of the decedent, since the earlier trust, at the

time of the execution of the 1932 trust, was includable in the decedent's gross estate in accordance with the amended provisions of Section 302 (c). Thus, we believe it impossible to attribute to Congress the intention to permit such an obvious device to avoid the incidence of a tax about which it has displayed such solicitude.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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DECEMBER, 1937.

APPENDIX

As originally enacted, Section 302 (c) of the Revenue Act of 1926, c. 27, 44 Stat. 9, provided:

> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * * (U. S. C., Title 26, Sec. 411.)

The Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, amended subsection (c) to read as follows (the language in italics representing the new matter):

> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* ex-

cept in case of a bona fide sale for an adequate and full consideration in money or money's worth. (U. S. C., Title 26, Sec. 411 (c).)

Section 302 (c) was further amended by Section 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169, to read as follows:

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title. (U. S. C., Title 26, Sec. 411.)

Section 302 (h) of the Revenue Act of 1926, *supra*:

Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f),

and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 411.)

Regulations 80 (1934):

ART. 18. *Transfers with possession or enjoyment retained.*—(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death", includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(b) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10:30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932. See section 506 of the Revenue Act of 1934.

Regulations 70 (1929 Edition):

ART. 18. *Reservation of income or an annuity.*—A transfer, not amounting to bona fide sale for an adequate and full consideration in money or money's worth, is taxable where the decedent reserved to himself during life the entire income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment at the death of the decedent, and the value of the entire property should be included in the gross estate.

Where the decedent reserved only a portion of the income, only a corresponding proportion of the value of the property should be included in the gross estate, unless, however, the possession or enjoyment of the remaining portion of the transferred property, or a part thereof, was postponed until at or after the decedent's death, in which case there should also be included in the gross estate such remaining portion or part thereof, as the case may be. Thus, for example, if the reservation was one-half of the income then one-half of the value of the transferred property should be included, and if, in addition to such reservation, it was intended by the decedent that possession or enjoyment of the remaining portion of the property should be postponed until at or after his death, then the value of the entire property should be included.

* * * * *

Article 18 of Regulations 70 (1926 Edition), and of Regulations 68 (1924) contains in substantially the same language the foregoing provisions of Article 18 of Regulations 70 (1929 Edition).

Regulations 63 (1922):

ART. 20. *Reservation of income.*—A transfer, not amounting to a bona fide sale for a fair consideration in money or money's worth, is taxable where the decedent reserved to himself during life the income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment at the death of the decedent, and the value of the entire property should be included in the gross estate. Where the decedent reserved a proportionate part of the income, only a corresponding proportion of the value of the property should be included in the gross estate. If, for example, he reserved one-half of the income, the value of one-half of the property transferred should be included in the gross estate. If he reserved an annuity, so much of the property as is necessary to produce the annuity should be included in the gross estate. A transfer is taxable in accordance with these principles whether the decedent reserved the annuity out of the property conveyed, or payment thereof to him was made by the grantee upon an express or an implied agreement to that effect. * * *

Regulations 37 (1921 Edition):

TRANSFERS INTENDED TO TAKE EFFECT AT OR AFTER DEATH

ART. 24. *Reservation of income.*—A transfer is taxable where the grantor reserves to himself during life the income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment after the death of the grantor, and the value of the entire property should be included in the gross estate.

Where the grantor reserves a proportionate part of the income, only a corresponding proportion of the property should be included in the gross estate, unless the transfer was made in contemplation of death. If, for example, he reserves one-half of the income, the value of one-half of the property transferred should be included in the gross estate. If he reserves an annuity, so much of the property as is necessary to produce the annuity should be included in the gross estate. Where the property does not produce income, its value as of the date of the decedent's death should be ascertained, and so much of this sum as is necessary to produce the annuity should be included in the gross estate. A transfer is taxable in accordance with these principles whether the grantor makes a reservation of the annuity out of the property conveyed, or exacts from the grantee an agreement to pay the annuity. * * *

Regulations 37 (1919 Edition), Article 24, contains provisions identical with the foregoing.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1937

No. 349

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

ELLAR BULLARD, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF CLARA R. SMITH, DECEASED,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SAMUEL S. HOLMES,
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Of Counsel.

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INDEX.

PAGE

Opinions below 2

Jurisdiction 2

Question presented 2

Statute involved 3

Statement of the case 3

Issues determined by Circuit Court of Appeals 6

Summary of Argument 8

Argument:

I. No constitutional question is properly before this Court for determination 9

II. The decision of the Circuit Court of Appeals on the constitutional question is in complete accord with the decisions of this Court controlling with respect to the issues here presented 14

Conclusion 19

Appendix 21

PAGE

CITATIONS.

Cases:

Becker v. St. Louis Union Trust Co., 296 U. S. 48 16
Binney v. Long, 299 U. S. 280 15
Burnet v. Northern Trust Co., 283 U. S. 782 ..... 15, 18
Coolidge v. Long, 282 U. S. 582 15
DeRousse v. Williams, 181 Iowa 379, 164 N. W. 896 13
Edwards v. Slocum, 264 U. S. 61 19
Guaranty Trust Co. v. Blodgett, 287 U. S. 509 18
Hagen v. Anderson, 317 Ill. 173 12
Handy v. Delaware Trust Co., 285 U. S. 352 17
Heiner v. Donnan, 285 U. S. 312 ..... 16, 19
Helvering v. Helmholz, 296 U. S. 93 ..... 13, 16
Helvering v. St. Louis Union Trust Co., 296 U. S. 39 ..... 14, 16
Klein v. United States, 283 U. S. 231 16
Langnes v. Green, 282 U. S. 506 9
May v. Heiner, 281 U. S. 238 ..... 13, 15, 17
Maynard v. Farmers Loan & Trust Co., 208 App. Div. 122, 203 N. Y. S. 83, (affirmed 238 N. Y. 592, 144 N. E. 905) 13
Morsman v. Burnet, 283 U. S. 783 ..... 15, 18
McCormick v. Burnet, 283 U. S. 784 ..... 15, 18
Nichols v. Coolidge, 274 U. S. 531 ..... 15, 19

PAGE

CITATIONS (continued).

Cases (continued):

Public Service Commission of Puerto Rico v. Havemeyer, 296 U. S. 506 9

Shukert v. Allen, 273 U. S. 545 15

Stedman v. Tate, 326 Ill. 442 12

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555 9

Stelos Co. v. Hosiery Motor-Mend Corp., 295 U. S. 237 9

United States v. Wells, 283 U. S. 102 17

White v. Poor, 296 U. S. 98 ..... 13, 16

Wolf v. Uhlemann, 325 Ill. 165 12

Y. M. C. A. v. Davis, 264 U. S. 47 19

Statutes:

Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516 (U. S. C., Title 26, Sec. 411) 21

Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 302, as amended (U. S. C., Title 26, Sec. 411) 21

Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 803 (U. S. C., Title 26, Sec. 411) 21

Miscellaneous:

Treasury Decision, T. D. 4314, X-1, C. B., 450 ..... 13, 22

Treasury Regulations 70, Art. 18 ..... 13, 24

Treasury Regulations 80, Art. 18(b) 13

IN THE

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No. 349

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

SELLAR BULLARD, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF CLARA R. SMITH, DECEASED,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States of America:

Respondent, Sellar Bullard, as Executor under the Last Will and Testament of Clara R. Smith, deceased, respectfully submits his brief in opposition to the petition of Guy T. Helvering, Commissioner of Internal Revenue, petitioner, for a writ of certiorari.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 134-148), is reported at 34 B. T. A. 243.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 165-172) is reported at 90 F. (2d) 144.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered on May 25, 1937 (R. 172). The petition for certiorari was filed on August 25, 1937. Jurisdiction of this Court to issue the writ applied for is invoked by petitioner under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Petitioner has prayed that a writ of certiorari issue to review the question of the constitutionality of § 302(c), Revenue Act of 1926, as amended by Joint Resolution of Congress (Pub. 131), approved March 3, 1931, and by § 803(a), Revenue Act of 1932. This was but one of the four principal questions of law passed upon by the Circuit Court of Appeals (see *infra* pp. 6, 7). Respondent contends that the question presented by petitioner is not properly brought before this Court in this proceeding, for the reason that the Circuit Court of Appeals erred in finding that, under the peculiar facts of this case, the transfer involved was within the scope of said statute (see *infra* p. 9). If the lower court had not so erred, no constitutional question would have been before that court.

Statute Involved.

The statute with respect to which the constitutional question is presented by petitioner is § 302 (c), Revenue Act of 1926, c. 27, 44 Stat. 9, § 302 (c) (U. S. C., Title 26, § 411), as amended by Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516 (U. S. C., Title 26, § 411) set forth in the Appendix *infra* p. 21.

Statement of the Case.

There has been no controversy with respect to the facts of this case. Petitioner introduced no evidence at the hearing before the Board of Tax Appeals, and the undisputed facts pertinent to the issues are set forth in the agreed Statement of Evidence (R. 17-36).

Petitioner's statement of facts (see pp. 2-5 of Petition) is insufficient for this Court to determine whether the writ should be granted, in that he has failed to state the following essential facts:

1. Decedent created an irrevocable *inter vivos* trust on March 3, 1927, consisting of securities of an aggregate value slightly in excess of $300,000, reserving to herself the income therefrom for life (Ex. 1, R. 37). Decedent executed a second irrevocable *inter vivos* trust on February 17, 1932, consisting of the same securities held under the 1927 trust, to the extent of one-third of the value thereof, also reserving to herself the income therefrom for life (Ex. 4, R. 64).

2. The trust of February 17, 1932, was executed in pursuance of a provision of an oral family settlement agreement, which provided for the preservation intact of one-third of the corpus of the 1927 trust and the dissolution of the remainder thereof.

After decedent was dissuaded by her family from filing a bill to declare the trust of March 3, 1927, invalid because of fraud in the inducement by her son Edward (R. 20, 21, 34), decedent was desirous of entering into an agreement with all the beneficiaries of that trust to secure its termination in order to effect a rearrangement of her property dispositions and get certain securities held under the trust out of the control of the trustee (R. 18-20, 32, 33). It was impossible to secure the consent to the termination of the trust of Virginia Winslow Smith, life beneficiary of one of the three $100,000 trust funds thereunder, unless her interest thereunder be preserved intact (R. 21, 28, 29, 35). The other adult beneficiaries consented to such termination upon decedent's promise to substitute other gifts to them for their interests under the trust (R. 21, 31, 32, 33, 34). It also was necessary, in order to secure a termination of the 1927 trust, to protect and preserve adequately the interests of the minor beneficiaries under that trust (R. 20). It was determined to effectuate the proposed family agreement by bringing a friendly family suit to terminate the trust of March 3, 1927, on some legal technicality (R. 21, 22, 34). The technicality advanced was that a part of the trust was invalid under the Rule against Perpetuities (R. 23, 34). In order to avoid unpleasant family controversy, an oral family settlement agreement was entered into between decedent and all the beneficiaries under said trust, which provided, in part, that upon dissolution of said trust by the entry of a decree in the pending action by consent of the adult beneficiaries, and upon representation to the court of the protection of the interests of the minors, one-third of the corpus of said trust should be preserved intact by the execution of a new trust instrument to carry the same (R. 22, 23, 28, 35). It was provided that this new trust should be created prior to the entry of a decree dis-

solving the old trust (R. 29, 35). The new trust was executed on February 17, 1932 (R. 23, 35), and a consent decree dissolving the old trust was entered subsequent thereto on February 27, 1932 (R. 25, 36; Ex. 20, R. 98). Apart from the recitals of the consent decree there was no determination of the invalidity of the trust of March 3, 1927, under the Rule against Perpetuities, or for any other reason.

3. The execution of the second trust of February 17, 1932, was but one of the provisions of the oral family settlement referred to above. This agreement was entered into by all the beneficiaries under the 1927 trust as a means of (1) securing the consent of Virginia Winslow Smith, a beneficiary under the 1927 trust, to its termination (R. 23, 28, 29, 35), (2) protecting the interests of the minor beneficiaries under the 1927 trust (R. 22, 27, 28, 33), and (3) securing decedent's release of whatever rights she might have to secure dissolution of the 1927 trust by prosecution of her pending action (R. 23, 35). These purposes were effectuated under the family settlement agreement in the following manner:

(a) Creation of the "second trust" of February 17, 1932, which preserved Virginia Winslow Smith's life interest under the 1927 trust intact, and gave the remainder interest thereunder to decedent's two daughters equally (Ex. 4, R. 64).

(b) Outright gifts of securities of the value of $10,000 to each of the decedent's two married grandchildren, in lieu of a part of their interests relinquished under the old trust (R. 22, 31).

(c) Execution of a new will by decedent making enlarged gifts to decedent's grandchildren (her five grandchildren received $25,000 each, including the $10,000 outright gifts

of securities to two of them referred to above (R. 22)), and setting up new trusts of $100,000 for each of decedent's two daughters for life, with remainders to their respective children (Exs. 5, 21, R. 72, 108). Certain of the grandchildren were minors.

(d) Entry of a consent decree dissolving the first trust, which decree recited the grounds set forth in the bill of complaint; representation being made to the court that the minor beneficiaries were receiving in lieu of their interests under the old trust more valuable interests under the provisions of the family agreement.

Issues Determined by Circuit Court of Appeals.

Since the question of the constitutionality of the taxing statute is the only question presented upon which a review by this Court is prayed by petitioner, and since it is the contention of respondent that this constitutional question does not come properly before this Court in this case, it is important to set forth the exact issues which were before the Circuit Court of Appeals. These were as follows:

1. Whether under the peculiar facts of this case the second trust of February 17, 1932, is within the scope of § 302(c) of the Revenue Act of 1926 as amended by Joint Resolution of Congress (Pub. 131), approved March 3, 1931, or as further amended by § 803(a) of the Revenue Act of 1932;
2. Whether said §.803(a) of the Revenue Act of 1932 may be applied retroactively to said trust created before the date of its enactment;

3. If said second trust is within the scope of said § 302(c) of the Revenue Act of 1926, with any applicable amendment thereto, whether the application of said statute, with such amendment, to include the entire corpus of said trust in decedent's gross estate for federal estate tax purposes is a constitutional exercise of the taxing power under the Fifth Amendment;

4. Whether said second trust is subject to federal estate tax under the provisions of § 302(d), Revenue Act of 1926, because of the reservation of a possibility of reverter to the settlor.

The Circuit Court of Appeals held (1) that the trust of February 17, 1932, the so-called "second trust", was within the scope of § 302(c), Revenue Act of 1926 as amended by the 1931 Joint Resolution (R. 165, 167, 168), (2) that the 1932 amendment was immaterial in view of the court's conclusions (R. 165, 168), (3) that the application of § 302 (c) as amended by the 1931 Joint Resolution to include the corpus of the second trust in the gross estate of decedent for federal estate tax purposes was in violation of the Fifth Amendment to the Constitution (R. 165, 168-171), and (4) that the second trust was not subject to federal estate tax under the provisions of § 302(d), Revenue Act of 1926 (R. 165, 171, 172).

SUMMARY OF ARGUMENT.

The writ of certiorari prayed for by petitioner should be denied for the following reasons:

1. No question with respect to the constitutionality of § 302(c), Revenue Act of 1926, with any applicable amendment thereto, is properly before this Court, for the reason that the Circuit Court of Appeals erred in not holding that the trust of February 17, 1932, was not within the scope of said statute. If the Circuit Court of Appeals had so held, no decision upon the constitutional question would have been necessary.

2. Even if the trust of February 17, 1932, should be found properly to be within the scope of said § 302(c), Revenue Act of 1926, with any applicable amendment thereto, the decision of the Circuit Court of Appeals that said § 302(c), as amended by Joint Resolution (Pub. 131), approved March 3, 1931, is in violation of the Fifth Amendment in so far as applicable to this trust, is in accord with decisions of this Court which are controlling with respect to the issues here presented, and is not in conflict with any decision of this Court or with a decision of a Circuit Court of Appeals in any other circuit.

ARGUMENT.

I. No constitutional question is properly before this Court for determination.

The question with respect to whether § 302(c), Revenue Act of 1926, as amended by Joint Resolution (Pub. 131), approved March 3, 1931, is in violation of the Fifth Amendment to the Constitution of the United States, urged by petitioner as the ground upon which the Court should grant a writ of certiorari in this cause, is not properly before this Court, for the reason that the Circuit Court of Appeals erred in holding, under the undisputed facts of this case, that the trust of February 17, 1932, was within the scope of said statute as amended.*

*Respondent, in contending that the Circuit Court of Appeals erred in holding that the trust of February 17, 1932, was within the scope of § 302(c) as amended by the 1931 Joint Resolution, has not filed a cross-petition for certiorari, since such procedure has been held by this Court to be unnecessary where, as in this case, respondent raises this point, not to attack the decision below, but to sustain it,—the error of the lower court being in its interpretation of the undisputed facts rather than in its judgment. *Langnes* v. *Green*, 282 U. S. 531, 536-539; *Public Service Commission of Puerto Rico* v. *Havemeyer*, 296 U. S. 506, 509; *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 560. See also *Stelos Co.* v. *Hosiery Motor-Mend Corp.*, 295 U. S. 237, 238, 239. On certiorari to the Circuit Court of Appeals, the entire record is before this Court with power to review the action of the Circuit Court of Appeals and direct such disposition of the case as that court might have made of it. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 567.

If the Circuit Court of Appeals had found, as the undisputed facts require, that the said "second trust" was not within the scope of said statute, no question of the violation of any constitutional provision by the application of said statute would have been before that court. Hence no question with respect to the constitutionality of said statute is now before this Court, if the Circuit Court of Appeals was in error in its finding with respect to the facts.

The Circuit Court of Appeals found the trust of February 17, 1932, to be within the scope of the statute upon the theory that since the consent decree terminating the old trust decreed that the property held thereunder be transferred back to decedent, the execution of the "second trust" was a new transfer by decedent of property owned by her free of any claim of any other person (R. 165, 167).

In reaching this result the court disregarded the entire purpose and legal effect of the family settlement agreement, the terms of which agreement the court accurately sets forth in its opinion as a part of the undisputed facts of the case (R. 165, 166).

The purpose of this family settlement agreement was to assure to the other beneficiaries of the first trust of March 3, 1927, that if they should consent to a dissolution of that trust, they could compel decedent to perform her part of the agreement, viz: (1) execution of the new trust, (2) making the outright gifts to grandchildren, and (3) execution of the new will bequeathing greatly enlarged interests thereunder to both children and grandchildren.

The general plan of the family settlement agreement was agreed upon by decedent and the beneficiaries of the 1927 trust other than Virginia Winslow Smith (life beneficiary as to one-third after decedent's death, who refused to consent to termination of the trust until assured of the preservation of her interest intact), prior to institution of the action to terminate said trust (R. 22, 23, 34). The

specific terms of said agreement were formulated and agreed to by Virginia Winslow Smith, and all the other beneficiaries of said trust prior to entry of the consent decree terminating said trust, which decree was entered in pursuance of said agreement (R. 23, 35). The agreement provided that the adult beneficiaries would consent to the entry of the decree on the grounds stated in the bill in consideration for decedent's promise to perform the other provisions of the agreement, including the preservation of one-third of the trust corpus intact by execution of the new trust instrument (R. 23, 35). Fulfillment of those provisions of the agreement by decedent was conditioned upon the consent of the beneficiaries to such entry of the decree. Thus, the beneficial interests of the parties were fixed by the agreement and not by the consent decree entered in pursuance thereof.

The effect of this agreement was in no way changed by the recital of the consent decree that the trust of March 3, 1927, was void because in violation of the Rule against Perpetuities, and that said trust was thereby dissolved and the property held thereunder transferred back to the donor. This decree was the proper means to effect the end desired, viz: dissolution of the old trust by consent of the adult beneficiaries, and the representation to the court that the interests of the minor beneficiaries were being adequately protected under the family agreement by interests being given to the minor beneficiaries of greater value than they had had under the old trust. The consents of the beneficiaries other than decedent to the termination of the 1927 trust as to the two-thirds thereof which did not constitute the corpus of the second trust, furnished adequate consideration for the promises of decedent to execute the new trust instrument preserving the one-third of the old trust corpus intact, to execute the new will, and to, make the substantial outright gifts.

If decedent had in any manner failed or refused to carry out her part of the contract, which included her agreement to execute the new trust to preserve intact one-third of the old trust corpus, she could have been compelled to do so by an action by the other beneficiaries to compel specific performance of her agreement. That was the purpose of the family agreement. Otherwise there would have been no reason for entering into any such agreement.

Although the consent decree be considered as a judicial determination that ownership of the property held under the first trust was revested in decedent upon the dissolution thereof, as held by the Circuit Court of Appeals (R. 165, 167), the *beneficial* title to that part of the trust property which constituted the corpus of the second trust remained in the beneficiaries by reason of the family settlement agreement nevertheless. The fact that the consent decree ordered the return of the corpus of the first trust to decedent did not affect her agreement to keep one-third of the corpus thereof intact by executing the new trust instrument. This agreement could have been enforced against her by the beneficiaries. It is settled in Illinois that the provisions of a family settlement agreement are specifically enforcible in equity. *Stedman* v. *Tate*, 326 Ill. 442, *Wolf* v. *Uhlemann*, 325 Ill. 165, *Hagen* v. *Anderson*, 317 Ill. 173.

It is clear, therefore, that irrespective of the recitals of the consent decree, decedent, upon dissolution of the first trust, received back only legal title to the property held thereunder which was to constitute the corpus of the second trust. Equitable title to such property remained in the beneficiaries as provided by the provisions of the family agreement, on behalf of which beneficiaries decedent acted in executing the second trust to preserve their equitable interests as provided by said agreement. The actual

"settler" of a trust is the actual beneficial owner of the trust property at the time of creation of the trust. See *Maynard* v. *Farmers Loan & Trust Co.*, 208 App. Div. 112, 203 N. Y. S. 83 (affirmed 238 N. Y. 592, 144 N. E. 905), *DeRousse* v. *Williams*, 181 Iowa 379, 164 N. W. 896.

Since decedent, upon dissolution of the first trust, received no more than bare legal title to the property comprising the second trust, it must follow that the second trust was merely a continuation of the first trust as to one-third of the property held thereunder, and was not itself a new transfer.

The first trust, created in 1927, being irrevocable, was not subject to federal estate tax under § 302(c), Revenue Act of 1926. *May* v. *Heiner*, 281 U. S. 238. The preservation of the already vested interests in one-third of the corpus thereof by means of the execution of the second trust was therefore not within the scope of either the 1931 Joint Resolution amending § 302(c), or of § 803(a), Revenue Act of 1932, again amending said section, since the rule has been settled by this Court that a federal estate tax statute can have no retroactive effect to tax such a transfer completed before enactment of the statute. *Helvering* v. *Helmholz*, 296 U. S. 93, *White* v. *Poor*, 296 U. S. 98.

After enactment of the 1931 Joint Resolution amending § 302(c), the Treasury Department ruled that only prospective application should be given to that statute. T. D. 4314, X-1, C. B. 450; see Appendix *infra* p. 22. This ruling was incorporated into the Regulations. See Reg. 70, Art. 18, Appendix *infra* p. 24. The Treasury Department later reversed its position on November 7, 1934, subsequent to the date of decedent's death, which occurred on May 24, 1933. Reg. 80, Art. 18(b).

Petitioner states that he shall contend that a retrospective application of the 1931 and 1932 amendments to the 1927 trust is not unconstitutional (see Petition, pp. 8, 9, footnote). This point has been settled by this Court against petitioner's contention in *Helvering* v. *Helmholz*, and *White* v. *Poor*, *supra*. It also is important to note that this proceeding does not involve any attempt to collect a deficiency tax based upon the inclusion of any part of the 1927 trust in decedent's gross estate, the assessment having been levied by the Commissioner upon the corpus of the 1932 trust (R. 5, 6, 135, 165).

Respondent respectfully submits that if the Circuit Court of Appeals had not erred in its legal conclusion arrived at upon the basis of the undisputed facts, the decision in this case would have been confined to its own peculiar facts, and that by reason of that error no constitutional question nor any question requiring the cognizance of this Court now is properly before this Court for decision.

II. The decision of the Circuit Court of Appeals on the constitutional question is in complete accord with decisions of this Court controlling with respect to the issues here presented.

This respondent respectfully submits that the decision of the Circuit Court of Appeals is entirely in accord with and based upon decisions of this Court which have clearly established the constitutional principles of federal estate taxation upon which this decision is based.

These decisions are fully set forth by the Circuit Court of Appeals in its unanimous opinion herein (R. 168). The event which gives rise to the federal estate tax is the death of the decedent with the resulting transfer of his estate, either by will or the laws relating to intestacy; *Helvering*

v. *St. Louis Union Trust Co.*, 296 U. S. 39, 41. In order for the estate tax to attach to a transfer, the taking effect of the transfer must be dependent upon and in some way effectuated by decedent's death. *Shukert* v. *Allen*, 273 U. S. 545, 547.

In *Nichols* v. *Coolidge*, 274 U. S. 531, 540, this Court held that an irrevocable *inter vivos* transfer with the reservation of a life interest to the transferor but with the remainder interests vested at the time of the transfer "was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death." Continuing, the Court said in that case (at p. 540): "The mere desire to equalize taxation cannot justify a burden on something not within congressional power". In *Coolidge* v. *Long*, 282 U. S. 582, 597, it was held that the provision for the payment of income to the settlors of a trust during their lives did not operate to postpone the vesting in the remaindermen of the right to possession or enjoyment, that the death of the settlor-life tenants was not the generating source of any right in the remaindermen, and that nothing moved from the settlor-life tenants to the remaindermen upon the settlor's death. This rule was recently reiterated in *Binney* v. *Long*, 299 U. S. 280, 287, 288.

In *May* v. *Heiner*, 281 U. S. 238, *Burnet* v. *Northern Trust Co.*, 283 U. S. 782, *Morsman* v. *Burnet*, 283 U. S. 783, and *McCormick* v. *Burnet*, 283 U. S. 784, the rule was established by this Court that an irrevocable *inter vivos* transfer not made in contemplation of death, with the entire interest in remainder vested at the time of the transfer in persons other than the transferor, but with the reservation to the transferor of the income from the property for life, is a transfer *complete when made*, and is not a transfer testamentary in nature, and that upon

the death of the transferor-life tenant nothing passes from him to the remaindermen.

This rule has been consistently applied by this Court. In *Helvering* v. *Helmhole*, 296 U. S. 93, 98, and *White* v. *Poor*, 296 U. S. 98, 102, cases involving the retroactive application of § 302(d), Revenue Act of 1926, it was held that where decedents created irrevocable *inter vivos* trusts reserving the income of the whole or a part of the trust property to themselves during their lives, the respective transfers were *complete* at the time of the creation of the respective trusts. The test of taxability based upon the determination of completeness of the transfer at the time when made was also applied in *Klein* v. *United States*, 283 U. S. 231, in *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39, and in *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48.

Nichols v. *Coolidge* and *Coolidge* v. *Long*, *supra*, were cases involving the retroactive application of the taxing statute. *May* v. *Heiner* and the three *per curiam* cases *supra* were cases involving the construction of the language of the taxing statute. However, the same rules therein enunciated and consistently followed were applied by this Court on the question of the constitutionality of the taxing statute under the Fifth Amendment, in *Heiner* v. *Donnan*, 285 U. S. 312. In that case, which involved the precise question of the constitutionality of the conclusive presumption provided by § 302(c), Revenue Act of 1926, that all transfers by a decedent made within two years prior to his death and without consideration, were made in contemplation of death, this Court held that provision as applied to an irrevocable transfer by *inter vivos* trust to be in violation of the due process clause of the Fifth Amendment, and laid down the principle that *transfers* inter vivos

not testamentary in character may not constitutionally be taxed under a death tax statute. See also *Handy* v. *Delaware Trust Co.*, 285 U. S. 352.

The rule was enunciated in *Heiner* v. *Donnan* that Congress may not label a transfer as testamentary which is not in fact testamentary in character for the purpose of subjecting it to a death tax; and the Court said (at p. 327) that such an attempt "is to measure the tax on A's property by imputing to it in part the value of the property of B," and is such an arbitrary and capricious exercise of the taxing power as to be a denial of due process of law under the Fifth Amendment.

Respondent would not deny that Congress has the power, in order to prevent evasion of estate tax, to reach *inter vivos* substitutes for testamentary dispositions, as for example in levying such a tax upon *inter vivos* transfers made in contemplation of death. See *United States* v. *Wells*, 283 U. S. 102, 116, 117. However, for such a tax to apply, the transfer made must actually be one testamentary in character. *May* v. *Heiner*, 281 U. S. 238. And such a transfer as that involved in this case has been clearly determined by this Court not to be a transfer testamentary in character, since nothing passed from the decedent to anyone else as the result of her death, the interest which she possessed immediately prior to her death being merely obliterated by that event. *May* v. *Heiner*, *supra*, at p. 243.

Respondent respectfully submits that the above rules as enunciated and consistently applied by this Court have been properly applied by the Circuit Court of Appeals in its decision in this case. There is no decision in conflict with this decision in any other circuit.

Respondent has attempted to draw an implication in the language of the *per curiam* decisions in *Burnet* v. *Northern Trust Co.*, 283 U. S. 782, *Morsman* v. *Burnet*, 283 U. S. 783, and *McCormick* v. *Burnet*, 283 U. S. 784, that this Court intended to imply by the statement "there being no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved * * *", that Congress *did* have the constitutional authority to impose prospectively such a tax (See pp. 7, 9 of Petition). Respondent submits that petitioner has placed an erroneous meaning on said statement of this Court in said *per curiam* decisions by lifting said statement out of its context.

Respondent submits that this Court, in said *per curiam* decisions, did not intend to pass upon the constitutional authority of Congress to impose such a tax, but merely stated that said decisions were based upon the decision in *May* v. *Heiner*, 281 U. S. 238, a case of statutory construction, there being no constitutional question involved in said *per curiam* decisions.

Petitioner cites the decision of this Court in *Guaranty Trust Co.* v. *Blodgett*, 287 U. S. 509 (see Petition, p. 10) and advances the proposition that the decision of the Circuit Court of Appeals in the case at bar is in conflict with the decision of this Court in the *Guaranty Trust Co.* case. The decision in that case was that the State of Connecticut had power to levy a succession tax upon an *inter vivos* transfer with the reservation of a life estate, following the *dictum* of *Coolidge* v. *Long*, 282 U. S. 582, 596, that "Undoubtedly the *State* has power to levy such an excise upon property so passing after the taking effect of the taxing Act." (Italics ours.) The constitutional question with respect to the validity of such a succession

tax upon the interests transferred to beneficiaries by death bears no similarity to the constitutional question involved in the instant case. See *Nichols* v. *Coolidge*, 274 U. S. 531, 537; *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61, 62.

With respect to the amount of revenue involved in the decision upon the constitutional question,—it is obvious, as pointed out by this Court in *Heiner* v. *Donnan*, 285 U. S. 312, at p. 322, that the value of the remainder interests under such a transfer may be subjected to a gift tax levied at the time of the transfer. That the end to be achieved is desirable from the standpoint of revenue is no justification for the imposition of an unconstitutional tax.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

SAMUEL S. HOLMES,
Counsel for Respondent.

LORENTZ B. KNOUFF,
Of Counsel.

September 14, 1937.

APPENDIX.

Sec. 302(c), Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Joint Resolution (Pub. 131) approved March 3, 1931, c. 454, 46 Stat. 1516, so far as material to the issues in this case, is as follows:

> Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * * (U. S. C., Title 26, Sec. 411.)

Sec. 803(a), Revenue Act of 1932, c. 209, 47 Stat. 169, further amending said Sec. 302(c), Revenue Act of 1926, so far as material to the issues in this case, is as follows:

Sec. 803. FUTURE INTERESTS.

(a) Section 302(c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *" (U. S. C., Title 26, Sec. 411).

Treasury Decision, T. D. 4314, X-1 C. B. 450:

TREASURY DEPARTMENT,

OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Section 302(c) of the Revenue Act of 1926 was amended by a joint resolution (Pub. 131), approved 10:30 P. M., Washington, D. C., time, March 3, 1931, to read as follows (the portion added by the amendment is in italic):

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death* (1) *the possession or enjoyment of, or the income from, the property or* (2) *the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

In view of the decisions of the Supreme Court of the United States in *Nichols* v. *Coolidge* (274 U. S. 531 [T. D. 4072, C. B. VI-2, 351]), *May* v. *Heiner* (281 U. S. 238 [Ct. D. 186, C. B. IX-1, 382]), *Coolidge* v. *Long* (282 U. S., 582), *Burnet* v. *Northern Trust Co.* 51 S. Ct., 342), *Edgar M. Morsman, jr.* v. *Burnet* (51 S. Ct., 343) and *Cyrus H. McCormick* v. *Burnet* (51 S. Ct., 343), the portion added by the amendment to section 302(c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of section 302(h) of that Act, be applied *prospectively* only, *i. e.,* to such transfers coming within the amendment as were made *after* 10:30 P. M., Washington, D. C., time, March 3, 1931.

Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302(c) of the Revenue Act of 1926 and the above decisions of the Supreme Court.

David Burnet,

Commissioner of Internal Revenue.

Approved May 22, 1931

A. W. Mellon,

Secretary of the Treasury.

Treasury Regulations 70 (as amended by T. D. 4336, XI-1 C. B. 329, April 11, 1932.

Art. 18. *Retention of Possession, Enjoyment, or Income.*—Any transfer which was made by the decedent after 10:30 P. M., Washington, D. C., time, March 3, 1931, and under which he retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom, is taxable, provided such transfer was not a bona fide sale for an adequate and full consideration in money or money's worth.

Where the decedent retained the possession or enjoyment of, or the income from, only a part of the property, or where he retained the right to designate the persons who shall possess or enjoy only a part of the property or of the income therefrom, only a corresponding proportion of the value of the property should be included in the gross estate. Thus, for example, if the decedent retained one-half of the income, then one-half of the transferred property should be included.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1937

No. 349

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

SELLAR BULLARD, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF CLARA R. SMITH, DECEASED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief for Respondent.

SAMUEL S. HOLMES,
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INDEX.

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
Specification of errors to be urged	6
Summary of argument	7
Argument:	
I. The taxing statute as amended is not applicable to the transfer involved	11
II. The constitutional question—Pure gifts *inter vivos* may not constitutionally be classified with transfers at death and transfers testamentary in character for the purpose of subjecting them to Federal estate tax	18
A. The type of transfer here involved is a pure gift *inter vivos*	20
B. The classification of pure gifts *inter vivos* with transfers at death and transfers testamentary in character is a denial of due process of law	26
1. Pure gifts *inter vivos* not testamentary in character are not within the purview of the Federal estate tax	26

PAGE

2. The classification is not an exercise of the taxing power within the constitutional limitations determined by this Court 34

a. The classification is not necessary to prevent evasion of tax ....., 35

b. The classification is unreasonably harsh and oppressive when viewed in the light of the expected benefit 36

c. The classification arbitrarily ignores recognized rights to enjoy and convey individual property 39

C. The tax upon the value of the vested remainders is in effect a direct tax 39

D. If unconstitutional as a denial of due process of law for any reason whatsoever, the tax cannot be upheld even though it should be a measure reasonably requisite to prevent evasion 40

III. The 1931 and 1932 amendments to Section 302(c), Revenue Act of 1926, may not be construed to apply to a transfer before March 3, 1931, or if they may be so construed, they are unconstitutional 42

Conclusion 43

Appendix 45

PAGE

CITATIONS.

Cases:

Becker v. St. Louis Union Trust Co., 296 U. S. 48 23
Bergman v. Rhodes, 334 Ill. 137 13
Blodgett v. Guaranty Trust Co., 114 Conn. 207 ....29, 31, 32
Bromley v. McCaughn, 280 U. S. 124 35
Brooke v. Lord Mostyn, 33 Beav. 457, 55 Eng. Rep. 445 14
Burnet v. Guggenheim, 288 U. S. 280 36
Burnet v. Northern Trust Co., 283 U. S. 782 .....7, 8, 18, 20

Carney v. Benz, 90 F. (2d) 747 (C. C. A. 1st) 17
Cheshire v. Des Moines City Ry. Co., 153 Ia. 88 12
Commissioner v. Bryn Mawr Trust Co., 87 F. (2d) 607 (C. C. A. 3d) 17
Commissioner v. Porter, 92 F. (2d) 426 (C. C. A. 2d) 17
Coolidge v. Long, 282 U. S. 582 .....30, 33
Culross v. Gibbons, 130 N. Y. 447 17

Dearing v. Selvey, 50 W. Va. 4 12
De Rousse v. Williams, 181 Iowa, 379 17
Dickson v. Neal, 2 F. (2d) 533 (C. C. A. 8th) 14

Ellis v. Hunt, 228 Mass. 39 13

Guaranty Trust Co. v. Blodgett, 287 U. S. 509 .....31, 33
Guy v. Hansow, 86 Kan. 933 .....14, 15

Hagen v. Anderson, 317 Ill. 173 13
Hall v. Hall, 125 Ill. 95 13
Hammassapoulo v. Hammassapoulo, 134 S. C. 54 14
Handy v. Delaware Trust Co., 285 U. S. 352 29
Hastings v. Nesmith, 188 Mass. 190 13
Heiner v. Donnan, 285 U. S. 312 .....8, 9, 19, 20, 27, 37, 40

PAGE

Cases (continued):

Helvering v. City Bank Farmers Trust Co., 296 U. S. 85 ..... 8, 34, 35, 40
Helvering v. Helmholz, 296 U. S. 93 23
Helvering v. Marshall, No. 484, 1937 Term 10, 42
Helvering v. St. Louis Union Trust Co., 296 U. S. 39 ..... 8, 23, 26
Hoeper v. Tax Commission, 284 U. S. 206 ..... 9, 37, 38, 40
Honeyman v. Jarvis, 79 Ill. 318 12

Jones v. Abbott, 228 Ill. 34 ..... 12, 13

Klein v. United States, 283 U. S. 231 22
Knowlton v. Moore, 178 U. S. 41 30

Matthews v. Doner, 292 Ill. 592 14
May v. Heiner, 281 U. S. 238 ..... 7, 8, 18, 19, 20, 21, 30
Maynard v. The Farmers Loan & Trust Co., 208 App. Div. 112, (aff'd 238 N. Y. 592) 17
McCormick v. Burnet, 283 U. S. 784 ..... 7, 8, 18, 20
McDole v. Kingsley, 163 Ill. 433 ..... 12, 13
McKinley v. Watkins, 13 Ill. 140 12
Metzner v. Newman, 224 Mich. 324 14
Milliken v. United States, 283 U. S. 15 24
Morsman v. Burnet, 283 U. S. 783 ..... 7, 8, 18, 20
Murphy v. Booker, 139 Ar., 469 ..... 12, 13

Nichols v. Coolidge, 274 U. S. 531 ..... 23, 30

O'Brien v. Weiler, 68 Hun 64 (aff'd 140 N. Y. 281) 12
Owings v. Owings, 3 Ind. 142 12

Paine v. Doughty, 251 Ill. 396 13
Pool v. Docker, 92 Ill. 501 12
Porter v. Commissioner, 288 U. S. 436 25

PAGE

Cases (continued):

Reinecke v. Northern Trust Co., 278 U. S. 339....8, 20, 25, 39
Rowe v. Rowe, 187 Iowa 640 12

Saltonstall v. Saltonstall, 276 U. S. 260.....25, 30
Schlesinger v. Wisconsin, 270 U. S. 230 .....9, 40, 41
Sigsworth v. Coulter, 18 Ill. 204 12
Stedman v. Tate, 326 Ill. 442 13

Taft v. Commissioner, 92 F. (2d) 667 (C. C. A. 6th).... 17
Thompson v. Maxwell Land Grant & Railway Company, 168 U. S. 451 14
Tudor v. Vail, 195 Mass. 18 12

United States v. Mitchell, 74 F. (2d) 571 (C. C. A. 7th) 16, 17
United States v. Wells, 283 U. S. 102 .....24, 25

White v. Poor, 296 U. S. 98 23
Williams v. Williams, 204 Ill. 44 14
Wolf v. Uhlemann, 325 Ill. 165 14

Statutes:

Joint Resolution (Pub. 131), approved March 3, 1931, c. 454, 46 Stat. 1516 45

Revenue Act of 1926, c. 27, 44 Stat. 9, Section 302(c)..17, 45
Revenue Act of 1932, c. 209, 47 Stat. 169, Section 803(a) 46

IN THE

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No. 349

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

SELLAR BULLARD, AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF CLARA R. SMITH, DECEASED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief for Respondent.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 134-148) is reported in 34 B. T. A. 243.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 165-172) is reported in 90 F. (2d) 144.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 25, 1937 (R. 172). The petition for writ of certiorari was filed August 25, 1937, and granted October 11, 1937.

The Questions Presented.

The issues are:

(1) Whether a certain indenture executed by decedent on February 17, 1932, whereby an irrevocable *inter vivos* trust was created, was a transfer by decedent of property owned by her, within the application of Section 302(c), Revenue Act of 1926, as amended by Joint Resolution (Pub. 131), approved March 3, 1931, or as further amended by Section 803(a), Revenue Act of 1932.

(2) Whether, if said Section 302(c), as amended as aforesaid, may apply to the 1932 trust, said statute prospectively applied is not unconstitutional as in violation of the due process of law clause of the Fifth Amendment of the Federal Constitution.

(3) Whether, if the application of the taxing statute is to be determined with respect to a prior irrevocable *inter vivos* trust created by decedent on March 3, 1927, and not with respect to the 1932 trust, (the 1932 trust being held not to be a separate transfer by decedent of her own property), the 1931 or 1932 amendments to said Section 302(c), Revenue Act of 1926, may be construed to apply to such a trust created before March 3, 1931, and if so construed and applied, whether those enactments are not unconstitutional.

The Statutes Involved.

The statutes involved will be found in the Appendix, *infra* pp. 45, 46.

Statement.

Clara R. Smith, a resident of the State of Illinois, died testate on May 24, 1933. On March 3, 1927, she had created an irrevocable *inter vivos* trust consisting of securities which, in 1932, were valued in excess of $300,000, under which trust she reserved the income to herself for life. The trust instrument provided that upon decedent's death the trust should be divided into three equal funds, the income from which respective trusts was to be paid to decedent's three children,—Lora, Bessie, and Edward,—during their lives, with the remainders of the shares of the two daughters to their respective children. Upon Edward's death, in the event that no issue survived him, (which event actually occurred) the income from his share was to be paid to his widow for life, and upon her death the remainder was to be added in equal shares to the other two funds (Ex. 1, R. 37; R. 136, 165).

Edward Smith died in 1928, having had no children, but leaving a widow, Virginia Smith, surviving him (R. 17, 137, 165).

In 1931 decedent instituted a suit to have the 1927 trust declared void on the ground that the ultimate remainders in Edward's one-third after the life estate in the "widow" of Edward violated the rule against perpetuities, alleging that by reason of said invalidity of such provisions the scheme of the trust was destroyed, and praying that the entire trust corpus be ordered returned to decedent free of the trust (Ex. 3, R. 50; R. 23, 34, 35, 138).

Virginia Smith, widow of Edward, took a firm position in opposition to this action, contending that the trust was valid *in toto* (R. 35, 138, 166). Decedent's action was also opposed by the *guardian ad litem* appointed by the court to represent the interests of the infant beneficiaries in

remainder, children and grandchildren of the two daughters (R. 26-28).

Thereafter, in order to settle the pending suit, an oral compromise agreement was entered into by all the adult beneficiaries under the 1927 trust, including decedent and Virginia Smith, which agreement provided as follows:

1. All the adult defendant beneficiaries agreed to consent to the entry of a decree in the pending suit, according to the prayer of the bill; said decree to recite the termination of the 1927 trust and the restoration of the property held thereunder to decedent, provided that—

a. Before entry of the consent decree, a new trust would be declared of approximately one-third of the same securities held under the 1927 trust. Under this trust decedent was to receive the income for life, and Virginia Smith a life interest identical to that held by her under the 1927 trust, and upon her death the corpus would be divided between decedent's two daughters equally;

b. Securities of the value of $10,000 were to be transferred from the 1927 trust to each of two adult grandchildren, beneficiaries in remainder under the 1927 trust;

c. A new will would be executed by decedent, to remain in effect until her death, making the following provisions for the beneficiaries in remainder under the 1927 trust, and particularly for the purpose of protecting the interests of the infant beneficiaries thereunder—

(1) Omission of $53,000 in specific bequests to others than the immediate family under the then existing will;

(2) Bequests of $25,000 each to the three minor grandchildren;

(3) Bequests of $15,000 each to the two adult grandchildren (equalized with the minors by the $10,000 outright transfers of securities);

(4) Provision for two $100,000 trust funds,—one for each of decedent's two daughters for life,—with vested remainders to their respective children;

(5) Residue of her estate to be divided between decedent's two daughters;

2. The balance of the securities comprising the 1927 trust fund remaining after the creation of the new trust and the transfer of securities to the grandchildren, was to be returned to decedent (R. 22, 23, 138, 166).

Each of the provisions of the compromise agreement was carried out (R. 23-26, 35, 36, 138-143, 166), the trustee acting pursuant to instructions with respect to the transfer of one-third of the securities from the old trust into the new trust (Ex. 7, R. 81), the transfer of securities from the old trust to the two grandchildren (Ex. 8, R. 84), and the transfer of the remaining securities from the old trust to decedent (Ex. 8, R. 84). The new trust indenture was executed and delivered prior to the entry of the decree, with decedent as "trustor", on February 17, 1932 (Ex. 4, R. 64). The decree terminating the 1927 trust was entered by consent of the adult beneficiaries on February 27, 1932 (Ex. 20, R. 98), the *guardian ad litem* for the minor beneficiaries having represented to the court that the effectuation of the provisions of the compromise

agreement settling the pending litigation was for the best interests of the minors (R. 26-28).

The Commissioner of Internal Revenue included the corpus of the trust of February 17, 1932, in decedent's gross estate for Federal estate tax purposes, which trust was valued at $112,148.75 at the date of decedent's death (R. 135).

Specification of Errors to be Urged.

The Circuit Court of Appeals erred—

1. In holding that the question of respondent's liability for Federal estate tax must be determined with respect to the 1932 trust.

2. In failing to hold that there is no liability upon respondent for Federal estate tax deficiency for the reason that the question of liability must be determined solely with respect to the irrevocable 1927 trust, and said trust was not subject to the tax.

SUMMARY OF ARGUMENT.

I.

The irrevocable 1927 trust was not subject to Federal estate tax, even though decedent reserved the income therefrom for life. *May* v. *Heiner*, 281 U. S. 238, *Burnet* v. *Northern Trust Co.*, 283 U. S. 782, *Morsman* v. *Burnet*, 283 U. S. 783, *McCormick* v. *Burnet*, 283 U. S. 784.

Since this was so, the 1932 trust cannot be subject to Federal estate tax, for the reason that it was not created by decedent, she having had no equitable ownership in any of the property which constituted the 1932 trust at any time after her creation of the irrevocable 1927 trust except her right to receive the income therefrom, which right had been reserved to her under the 1927 trust. The 1932 trust was actually created by all the beneficiaries of the 1927 trust by virtue of a compromise agreement which provided, among other things, for the creation of said trust. The creation of the 1932 trust was not a gratuitous transfer by anyone, but rested upon the consideration furnished by the mutual determination by the beneficiaries of the 1927 trust of the value of their interests thereunder, in a compromise agreement whereby the pending dispute concerning the validity of the 1927 trust was settled.

However, if the taxing statute as amended be held to have any application to the 1932 trust, said transfer was nevertheless made for an "adequate and full consideration in money or money's worth" within the exemption clause of said statute.

II.

A transfer such as that here involved,—an irrevocable *inter vivos* transfer, not made in contemplation of death, with remainders vested at the time of the transfer but with the reservation to the transferor of the income from the property transferred during his life,—is a pure gift *inter vivos* and is not testamentary in character. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *May* v. *Heiner*, 281 U. S. 238; *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *Morsman* v. *Burnet*, 283 U. S. 783; *McCormick* v. *Burnet*, 283 U. S. 784.

Although Congress undoubtedly has the power to tax pure gifts *inter vivos* as such, it may not, by classifying pure gifts *inter vivos* with transfers at death and transfers testamentary in character, subject them to the Federal estate tax. Such a classification is so arbitrary and capricious as to be a denial of due process of law under the Fifth Amendment of the Federal Constitution.

Pure gifts *inter vivos*, not testamentary in character, are not within the purview of the Federal estate tax. *Heiner* v. *Donnan*, 285 U. S. 312; *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39.

The classification of such pure gifts *inter vivos* with transfers at death and transfers testamentary in character for the purpose of bringing them within the scope of the Federal estate tax, is not an exercise of the taxing power within the constitutional limitations determined by this Court in *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, 90, for the following reasons: (1) Such classification is not necessary to prevent evasion of tax, since pure gifts *inter vivos* such as that here involved may properly be reached by a gift tax upon such transfers. (2)

The classification is unreasonably harsh and oppressive when viewed in the light of the expected benefit, since its effect is to include in the decedent's gross estate for the purpose of measuring the tax thereon, property absolutely and irrevocably transferred to persons other than decedent during her lifetime; that is, it is to measure the tax upon A's property by imputing to it in part the value of the property of B, a result condemned in *Heiner* v. *Donnan, supra,* and in *Hoeper* v. *Tax Commission,* 284 U. S. 206. (3) The classification arbitrarily ignores recognized rights to enjoy and convey individual property, since the effect of the classification is to deny to a decedent the right freely to give his property to another by absolute gift bearing no relation to death without subjecting his estate to a death tax upon such property.

The tax upon the value of the vested remainder interests irrevocably transferred *inter vivos* is, in effect, a direct tax which is in violation of Article I, Section 9, subdivision 4 of the Constitution, because not apportioned as therein provided.

If the tax be unconstitutional as a denial of due process of law for any reason whatsoever, it cannot be upheld, even though it should be a measure reasonably requisite to prevent evasion. *Heiner* v. *Donnan, supra; Hoeper* v. *Tax Commission, supra; Schlesinger* v. *Wisconsin,* 270 U. S. 230.

III.

If it shall be held that the question of liability for the tax must be determined with respect to the irrevocable 1927 trust and not with respect to the 1932 trust,—the 1932 trust being held not to be a separate transfer by decedent of her own property,—neither the 1931 nor 1932 amend-

ments to said Section 302(c), Revenue Act of 1926, may be construed to apply to the 1927 trust created before March 3, 1931; or if they should be so construed to apply to said trust, then these enactments are unconstitutional. See brief for the respondent in *Helvering* v. *Marshall*, Number 484, present Term.

ARGUMENT.

I.

The Taxing Statute as Amended Is Not Applicable to the Transfer Involved.

The Circuit Court of Appeals held that Section 302(c), Revenue Act of 1926, as amended by Joint Resolution (Pub. 131), approved March 3, 1931, is applicable to the facts of this case because decedent received the income from the trust created on February 17, 1932, until her death. No question with respect to that trust having been created in contemplation of death is involved. This decision of the court was based upon the court's conclusion of law that decedent was the absolute owner of that property constituting the corpus of the 1932 trust at the time of its creation (R. 167). The facts of the case never have been in dispute.

It is the contention of respondent that this conclusion of law arrived at by the Circuit Court of Appeals is erroneous, because it is contrary to the undisputed facts.

An analysis of these facts, as contained in the agreed statement of evidence (R. 17-36), and as stated by the Board of Tax Appeals (R. 135-145), and by the Circuit Court of Appeals (R. 165-167), in their respective opinions, will demonstrate this error.

It is a well recognized rule that a compromise agreement such as that here involved which is entered into for the purpose of terminating pending litigation by the mutual

adjustment of the claims of the contending parties[1] is supported by a valid consideration[2] and is entitled to specific performance in equity.[3]

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[1]The function of a compromise agreement is not to admit the validity of any claim urged by any of the parties thereto, but is to enable said parties to settle the pending litigation by resolving the conflicting claims in such manner as they shall see fit, in order to terminate the dispute. *McDole* v. *Kingsley*, 163 Ill. 433; *Pool* v. *Docker*, 92 Ill. 501; *Sigsworth* v. *Coulter*, 18 Ill. 204; *Cheshire* v. *Des Moines City Ry. Co.*, 153 Iowa 88.

In such an agreement, with respect to litigation honestly inaugurated and earnestly prosecuted, the parties determine among themselves the value which they place upon their respective interests for the purpose of settling the controversy, and it is immaterial on whose side the right ultimately would prove to be, if the litigation should be prosecuted to a conclusion, for it must always be on one side of the controversy or the other. *Honeyman* v. *Jarvis*, 79 Ill. 318; *McKinley* v. *Watkins*, 13 Ill. 140, 144.

[2]There is a valid consideration for such a compromise agreement, which consideration is expressed in the mutual adjustment by the respective parties of the value of their respective interests under the agreement. *McDole* v. *Kingsley*, 163 Ill. 433; *Pool* v. *Docker*, 92 Ill. 501. The determination of such values will usually result in the exchange of the respective claims to interests under the existing controversy for new interests, different either in quantity or quality from the interests claimed. Cases are numerous in which such exchanges have been upheld, the determination of the values of the respective interests of the disputants constituting a perfect *quid pro quo*. See, for example, *Murphy* v. *Booker*, 139 Ark. 469; *Jones* v. *Abbott*, 228 Ill. 34; *Owings* v. *Owings*, 3 Ind. 142; *Rowe* v. *Rowe*, 187 Iowa 640; *Tudor* v. *Vail*, 195 Mass. 18; *O'Brien* v. *Weiler*, 68 Hun 64 (aff'd 140 N. Y. 281); *Dearing* v. *Selvey*, 50 W. Va. 4.

[3]The rule is well settled in Illinois that the provisions

Therefore the contract of settlement itself fixed and determined the interests of the donor and the beneficiaries in the 1927 trust fund. It must then follow that the conclusion of law arrived at by the Circuit Court of Appeals that the effect of the entry of the decree was to revest in decedent absolute ownership of *all* the property held under the 1927 trust "free of right, title, or claim of any other person", (R. 167) is a *non sequitur*. The beneficial ownership of the life interest of Virginia Smith, widow of Edward, and of the remainder interests of decedent's two daughters under the 1932 trust, must have vested in them under the contract of settlement. Decedent retained the life interest in that one-third of the 1927 trust fund which she already had. As to that one-third, the decree merely reinvested decedent with legal title, subject to the beneficial ownership fixed by the compromise agreement, for the purpose of giving effect to the provisions of the agreement.[4]

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of such a compromise agreement, where all questions of origin and extent of the respective legal rights of the parties are resolved by the compromise, will be specifically enforced in equity. *Stedman* v. *Tate*, 326 Ill. 442; *Hagen* v. *Anderson*, 317 Ill. 173; *Jones* v. *Abbott*, 228 Ill. 34; *McDole* v. *Kingsley*, 163 Ill. 433; *Hall* v. *Hall*, 125 Ill. 95.

[4]The provisions of such a compromise agreement may be effectuated, in whole or in part, by the entry of a decree in the pending litigation by consent of the parties. A decree entered by consent of the parties, pursuant to such a compromise agreement, is not a judicial determination of the legal rights of the parties in the pending litigation, but merely records the agreement of the parties and gives it judicial recognition and approval. *Murphy* v. *Booker*, 139 Ark. 469; *Hastings* v. *Nesmith*, 188 Mass. 190.

The rights of the parties under such a decree are based upon contract. *Bergman* v. *Rhodes*, 334 Ill. 137, 143; *Paine* v. *Doughty*, 251 Ill. 396, 400; *Ellis* v. *Hunt*, 228 Mass. 39.

The decree, of course, also served to determine that the provisions of the compromise agreement with respect to the treatment of the 1927 trust fund were for the best interests of the infant beneficiaries and that the agreement was binding upon them.[5]

It is true, as stated by the court, that a court decree, when entered, has the same force and effect as a decree *in invitum* (R. 167). Thus, the entry of the decree had the same effect as the giving of a deed to decedent by the

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[5]If the interests of infants are in controversy and the dispute is compromised by the adult parties in interest, in order for the compromise to be binding upon the infants, it must be determined by the court that the provisions of the compromise agreement are for the benefit of such infants, since a court of equity may authorize a compromise of an infant's litigation where the evidence shows that the case is a proper one for such compromise. *Wolf* v. *Uhlemann*, 325 Ill. 165, 185; *Matthews* v. *Doner*, 292 Ill. 592, 595; *Williams* v. *Williams*, 204 Ill. 44, 57. This determination is made where a *guardian ad litem* submits the agreement to the court, and the court approves it after an examination of the facts. *Thompson* v. *Maxwell Land Grant & Railway Company*, 168 U. S. 451, 462; *Dickson* v. *Neal*, 2 F. (2d) 533, 537 (C. C. A. 8th); *Metzner* v. *Newman*, 224 Mich. 324; *Brooke* v. *Lord Mostyn*, 33 Beav. 457, 458, 55 Eng. Rep. 445. The action of the court in such instance is not a judicial determination of what the rights of the infants would have been if the pending litigation had been prosecuted to a conclusion, but is merely a determination that the proposed settlement of the controversy is for their benefit. Upon such a determination, the agreement resolving the questions in litigation will be binding upon the infant parties in interest, (*Thompson* v. *Maxwell Land Grant & Railway Company, supra; Dickson* v. *Neal, supra; Metzner* v. *Newman, supra; Brooke* v. *Lord Mostyn, supra*) and may be enforced by them as an agreement made for their benefit. *Guy* v. *Hansow*, 86 Kan. 933, 937; *Hammassapoulo* v. *Hammassapoulo*, 134 S. C. 54, 61.

trustee would have had, but this could not affect the beneficial ownership of the property concerned, *for it must be remembered that at the time of the entry of the decree, entire beneficial ownership of that part of the 1927 trust property which was to comprise the 1932 trust was already determined under the provisions of the compromise agreement.* Entry of the decree was merely one of the means of effectuating the agreement. See *Guy* v. *Hansow*, 86 Kan. 933.

Since there was a valid subsisting compromise contract which, as the undisputed facts show, included the provision for creation of the new trust of one-third of the corpus of the 1927 trust, then the holding of the Circuit Court of Appeals that the effect of the decree was to restore to decedent absolute ownership of *all* the property transferred under the 1927 trust *is a holding that the decree entered by consent of the parties in pursuance of the agreement had the effect of nullifying the agreement.* The two propositions (1) that there was a valid subsisting compromise agreement which contemplated the creation of the new trust, and (2) that the decree operated to restore to decedent absolute title to all the 1927 trust property free of the trust and of the claims of any party, cannot stand together.

It is respondent's contention that, aside from the question of application of the exemption clause of the statute, the statute itself can have no application to the 1932 trust, for the reason that it was not created by decedent as a gratuitous transfer of property owned by her. But even if it should be found that the statute has application to this trust, it must still be held not to be taxable thereunder, for the reason that the transfer of the property into the trust, whether created by decedent or not, was certainly for an "adequate and full consideration in money

or money's worth" within the language of the exemption clause of the statute. It would be difficult to imagine a case where a transfer could be represented by consideration more complete or more tangible, or more easily reducible to money value, except it be paid for in dollars and cents themselves, and such is not required by the language. See *United States* v. *Mitchell*, 74 F. (2d) 571 (C. C. A. 7th). In return for creation of the 1932 trust of one-third of the corpus of the 1927 trust, the enforcible promise to make the new will, and the outright gifts of securities to the grandchildren, decedent received back two-thirds of the corpus of the 1927 trust, free of the trust. This determination of the respective rights of the donor and the beneficiaries in the 1927 trust property under the compromise was made without regard for what their rights might have been determined to be if the pending litigation had been prosecuted to a conclusion. Whether the 1927 trust was valid in every respect, or partially or wholly invalid as in violation of the rule against perpetuities, was the point at issue, and the subject of the compromise.

The Government's argument that the tax might be defeated in any case such as this, if respondent's contentions prevail, if the settlor and beneficiaries could by mutual consent substitute one trust for another (see petitioner's brief, p. 32), is without merit. It is obvious that in any such case, as in this one, the question of taxability must be determined by the statute in force at the time of the original vesting of the interests, as upon the creation of the 1927 trust in the instant case.

The contention of petitioner that the consideration was not such as to swell decedent's estate is contrary to the facts. Decedent's estate *was* increased to the extent of approximately $200,000 as the result of effectuation of the settlement (two-thirds of the 1927 trust corpus, valued

at approximately $220,000, less the $20,000 gifts in securities to the two grandchildren). This property was included in decedent's taxable estate at the time of her death. But, even if such had not been the case, petitioner's argument has been repeatedly rejected by the courts. *Taft* v. *Commissioner*, 92 F. (2d) 667 (C. C. A. 6th); *Commissioner* v. *Porter*, 92 F. (2d) 426 (C. C. A. 2d); *Carney* v. *Benz*, 90 F. (2d) 747 (C. C. A. 1st); *Commissioner* v. *Bryn Mawr Trust Co.*, 87 F. (2d) 607 (C. C. A. 3d); *United States* v. *Mitchell, supra.*

But with respect to the question of consideration, respondent does not rest his case upon the exemption clause of the statute, since the question of consideration here is a much deeper one than mere compliance with the exemption clause, being whether the statute itself can have any application where the consideration for creation of the 1932 trust was the mutual determination by the beneficiaries of the 1927 trust of the value of their respective interests under that trust, by virtue of the contract of settlement.

Decedent, in executing the 1932 trust instrument, dealt with the bare legal title revested in her by the decree as "trustor" for the benefit of the beneficial owners of the property. This does not mean that decedent was the real transferor or creator of the trust. The beneficial owner of the property transferred and not the nominal "trustor" is the real settlor of a trust. *De Rousse* v. *Williams*, 181 Iowa 379; *Culross* v. *Gibbons*, 130 N. Y. 447; *Maynard* v. *The Farmers Loan & Trust Co.*, 208 App. Div. 112 (aff'd 238 N. Y. 592.

Section 302(c) provides that property shall be included in the decedent's gross estate, for Federal estate tax purposes, "To the extent of any interest therein of which the

decedent has at any time made a transfer, by trust or otherwise . . ." (Italics supplied.) By no possible construction may the statute include within its scope, property transferred by persons other than decedent, as was the case here, where, under the compromise agreement, the beneficiaries of the 1927 trust dealt with the property interests vested in them under that trust, in such manner as to settle their controversy as to the validity of that trust and to determine the value of their respective interests thereunder, a part of such compromise consisting of the creation of a new trust for their own benefit.

The corpus of the irrevocable 1927 trust was not subject to Federal estate tax. *May* v. *Heiner*, 281 U. S. 238; *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *Morsman* v. *Burnet*, 283 U. S. 783; *McCormick* v. *Burnet*, 283 U. S. 784.

Therefore, the corpus of the 1932 trust, the beneficial ownership of which was never in decedent after her creation of the 1927 trust, cannot be subject to the tax.

II.

The Constitutional Question—Pure gifts inter vivos may not constitutionally be classified with transfers at death and transfers testamentary in character for the purpose of subjecting them to Federal estate tax.

There is no doubt but that Congress may tax pure gifts *inter vivos* as such. No question with respect to the existence of such power to tax is involved in this case. The question is whether Congress has the power to reach such gifts, not by a tax upon gifts *inter vivos*, but by classifying such transfers with transfers at death and transfers testamentary in character for the purpose of subjecting them to Federal estate tax. It is the contention of respondent

that such classification is so arbitrary and capricious as to be a denial of due process of law under the Fifth Amendment, and it was so held by the Circuit Court of Appeals in this case. Thus the question is one of the constitutional exercise of the admitted power.

It has been determined by this Court that a transfer such as that here involved—an irrevocable *inter vivos* transfer with remainders vested at the time of the transfer but with the reservation of income to the transferor for life—is a pure gift *inter vivos* and not testamentary in character. *May* v. *Heiner,* 281 U. S. 238. Pure gifts *inter vivos* have been determined by this Court not to be within the scope of the Federal estate tax, but properly taxable as gifts, and the classification of pure gifts *inter vivos* with transfers at death and transfers testamentary in character has been held to be a denial of due process of law under the Fifth Amendment. *Heiner* v. *Donnan,* 285 U. S. 312. Since such *inter vivos* transfers which bear no relation to death may be taxed as gifts, their classification with transfers at death and transfers testamentary in character, in an attempt to force them within the scope of the Federal estate tax, is not necessary to prevent evasion of tax. But even if the tax were a measure necessary to prevent evasion, it could not be upheld if unconstitutional for any reason.

The contentions of the Government in support of the tax rest upon two principal propositions: (1) that an *inter vivos* transfer which reserves to the transferee a life estate, operates as a reasonable substitute for a testamentary disposition, and as such properly may be classified with transfers at death and *inter vivos* transfers testamentary in character; (2) Congress was justified in making the classification because it reasonably anticipated that such transfers "might" be made to avoid estate taxes, and it had ample power to prevent such evasion.

Each of these contentions ignores the following fundamental principles of law applicable to Federal estate taxes, which have been consistently applied by this Court:

A. The Type of Transfer here Involved is a Pure Gift Inter Vivos.

An *inter vivos* transfer is a pure gift *inter vivos* where, at the time of the transfer, the transferor divests himself of all interest in the property transferred, and where the death of the transferor does not bring into being, or ripen for the transferee or anyone else, any property right or interest. *Heiner* v. *Donnan*, 285 U. S. 312, 323.

The type of transfer here involved—an irrevocable *inter vivos* transfer with remainders vested at the time of the transfer, the transferor reserving the income for life—was held by this Court to be a transfer complete when made and not to be testamentary in character in *May* v. *Heiner*, 281 U. S. 238, and in the three *per curiam* cases following that case, *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *Morsman* v. *Burnet*, 283 U. S. 783, and *McCormick* v. *Burnet*, 283 U. S. 784.

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 347, the Court had said:

> "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. Cf. *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61, 62; *N. Y. Trust Co.* v. *Eisner*, 256 U. S. 345, 349. It is not a gift tax, * * * One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this

statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute.

". . . In the light of the general purpose of the statute and the language of § 401 explicitly imposing a tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in § 402(c) 'to take effect in possession or enjoyment at or after his death,' include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under § 401. That doubt must be resolved in favor of the taxpayer."

In *May* v. *Heiner* this language of the *Reinecke* case was quoted and followed. Here the Court held that an irrevocable *inter vivos* transfer with remainders vested at the time of the transfer, but with the reservation of a life estate either mediately or immediately to the transferor, —the type of transfer involved in the instant case,—is a transfer complete when made, and is not a transfer testamentary in character because of the reservation of a life estate. The transfer was held not one "intended to take effect in possession or enjoyment at or after death" within the meaning of Section 402(c), Revenue Act of 1918. The Court said, (at p. 243):

"The transfer of October 1st, 1917, was not made in contemplation of death within the legal significance of those words. *It was not testamentary in character* and was beyond recall by the decedent. *At the death of Mrs. May no interest in the property held*

under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was *obliterated* by that event." (Italics supplied.)

In *May* v. *Heiner,* the reservation of the life estate to the transferor was made subject to a life estate provided for the transferor's husband. The decision in *May* v. *Heiner* was followed in the three *per curiam* decisions of *Burnet* v. *Northern Trust Co., Morsman* v. *Burnet,* and *McCormick* v. *Burnet,* each of which involved the direct reservation of life estates to the transferors.

The test applied by this Court in the *Reinecke* case, in *May* v. *Heiner,* and in the three *per curiam* cases, to determine whether the irrevocable *inter vivos* transfers there involved were pure gifts *inter vivos* or were transfers testamentary in character, was whether said transfers were complete when made. They were held to be complete when made when the interests in the corpus of the property transferred are vested in the transferees at the time of the transfer and do not remain contingent until the decedent's death. If such interests are so vested, the obliteration of whatever interest decedent may have retained in the property, ceasing on decedent's death, does not bring the corpus of the property within the application of the taxing statute. This rule was clearly stated and applied by the Circuit Court of Appeals in this case (R. 168, 169).

This principle has been consistently applied by this Court in other cases. The test to determine whether an *inter vivos* transfer was one within the scope of the taxing statute, viz.: whether the interests transferred were vested in the transferee at the time of the transfer, was applied in *Klein* v. *United States,* 283 U. S. 231, this time working in

the Government's favor. Here there was an *inter vivos* transfer by husband to wife of a life interest in land, together with a remainder contingent upon the transferee surviving the transferor. The court held the transfer taxable under Section 402(c), Revenue Act of 1918, the decision turning upon the point that the remainder interest remained vested in the grantor, and the interest of the grantee was a contingent remainder, to become vested in her only upon the grantor's death.

Likewise, in *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39, and in *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48, the same test was applied. These cases held that the reservation of a contingent possibility of reverter in the settlor of a trust, should the beneficiaries predecease him, did not make the transfer in trust one "intended to take effect in possession or enjoyment at or after his death," since death put an end to the grantor's interest, a possibility of reverter, by extinguishing it,—the *Helvering* case under Section 302(c), Revenue Act of 1924, and the *Becker* case under Section 302(c), Revenue Act of 1926, the provisions of which said two statutes in this respect are the same. In the *Helvering* case the *Klein* case was distinguished on the ground that there the interest transferred remained contingent until the grantor's death.

In cases involving retroactive application of a Federal estate tax statute the same test has been applied to deny application of the statute to *inter vivos* transfers with remainders vested before the date of its enactment. *Nichols* v. *Coolidge*, 274 U. S. 531; *Helvering* v. *Helmholz*, 296 U. S. 93; *White* v. *Poor*, 296 U. S. 98. Although these cases dealt with the retroactive application of the statute, if no vested property rights had been involved, the retroactive application of the taxing statute would not have been fatal.

Thus the rule has been definitely established that an irrevocable *inter vivos* transfer not made in contemplation of death, with remainders vested at the time of the transfer in persons other than the transferor, but with a reservation to the transferor of the income during his lifetime, is a transfer complete when made, and is not testamentary in character, merely because of the reservation of a life estate.

The fact that the transferor has reserved to himself a part of the total value of the corpus owned by him prior to the transfer, which part is represented by the right to income from the corpus during his life, does not mean that he has not completely divested himself of all right and interest in that part which he has transferred, viz.: the vested remainders.

The Government, in contending that the reservation of income by the transferor renders the transfer in effect a testamentary disposition, merely repeats the same argument which it made in *May* v. *Heiner* and in the three *per curiam* cases. The decision in these cases, that such a transfer *complete when made* is *not testamentary in character,* is the conclusive answer to the Government's argument.

But the Commissioner contends that such a transfer is not a pure gift *inter vivos,* but is a reasonable substitute for a testamentary transfer, on the theory that the reservation of a life estate gives to the transfer in and of itself an inherent testamentary quality. In support of his contention the petitioner relies upon two classes of cases where *inter vivos* transfers have been held by this court to be subject to the tax: (1) The cases involving gifts made in contemplation of death. *Milliken* v. *United States,* 283 U. S. 15; *United States* v. *Wells,* 283 U. S. 102;

(2) The cases involving transfers with reservation of control over the property to the transferor until death. *Reinecke* v. *Northern Trust Co., supra; Porter* v. *Commissioner,* 288 U. S. 436; *Saltonstall* v. *Saltonstall,* 276 U. S. 260.

There is no doubt but that it is proper to tax as a class all gifts where *inherent in the class* is the element which makes all transfers of the class subject to the tax, such as transfers made in contemplation of death.

The contemplation of death provision of the statute does not attempt to tax *all* gifts *inter vivos,* but is confined to such gifts as are made in contemplation of death, because the motive which induces such transfers is of the sort which leads to testamentary disposition, (*United States* v. *Wells,* 283 U. S. 102, 117), and death is the generating source of each transfer.

The transfers involved in the *Reinecke, Porter,* and *Saltonstall* cases were all transfers in which the property transferred remained subject to a power of control in the transferor until his death; in the *Reinecke* case by virtue of a power of revocation over the trusts; in the *Porter* case by virtue of a power to shift the interests of the beneficiaries; and in the *Saltonstall* case (involving the Massachusetts inheritance tax) by virtue of a power to revoke to be exercised in conjunction with one of the trustees. In each of these cases the reserved power of control to the transferor rendered the transfer incomplete until such power of control was removed by the transferor's death. In each case the gift could have been defeated at any time before death by the transferor's exercise of this power.

The relationship to death which is an inherent testamentary quality of every gift made in contemplation of death, and of every gift subject to the exercise of a power of control reserved to the transferor, because death is the

motive of the gift in the first classification and because death is the generating source of the gift in the second classification, is wholly lacking in irrevocable gifts *inter vivos* with vested remainders and with reservation of a life estate to the donor.

B. The Classification of Pure Gifts Inter Vivos with Transfers at Death and Transfers Testamentary in Character is a Denial of Due Process of Law.

1. Pure Gifts Inter Vivos not Testamentary in Character are not within the Purview of the Federal Estate Tax.

It is urged by the Government that Congress was justified in making the classification because it reasonably anticipated that such transfers "might" be made to avoid estate taxes, and that it had ample power to prevent evasion. This contention ignores the fundamental principle often announced by this Court that pure gifts *inter vivos* not testamentary in character are not within the purview of the Federal estate tax.

The scope of the Federal estate tax is limited to transfers at death and to transfers *inter vivos* which are testamentary in character. The rule was thus stated in *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39, 41, with particular reference to Section 302(c):

> "The substantive provision of the act which imposes the tax is §301(a); and by that provision the tax is laid 'upon the transfer of the net estate of every decedent dying after the enactment of this act.' The event which gives rise to the tax is the *death* of the decedent, with the resulting *transfer* of his estate either by will or the law relating to intestacy. When,

> therefore, §302(c) includes within the purview of §301(a) a transfer *inter vivos* 'intended to take effect in possession or enjoyment at or after his death' it does so upon the theory that such a transfer in effect is testamentary—that is to say, a substitute for either a disposition by will or a passing in virtue of intestacy."

That the type of transfer here involved is not testamentary in character merely by reason of the reservation of income by the transferor for life was determined by this Court in *May* v. *Heiner*, and the three *per curiam* cases following that decision (see *supra* pp. 21, 22).

That *inter vivos* transfers not testamentary in character and complete when made, may not constitutionally be classified with transfers at death and transfers testamentary in character in order to subject them to the Federal estate tax, was definitely established in *Heiner* v. *Donnan*, 285 U. S. 312. In that case, which held specifically that the conclusive presumption provided by Section 302(c), Revenue Act of 1926, that all transfers made within two years before death and without consideration were made in contemplation of death, was in violation of the due process clause of the Fifth Amendment, the Court said (285 U. S. 312, 322):

> "Section 301 of the Revenue Act of 1926 imposes a tax 'upon the transfer of the net estate of every decedent,' etc. There can be no doubt as to the meaning of this language. The thing taxed is the transmission of property from the dead to the living. *It does not include pure gifts inter vivos.* The tax rests, in essence, 'upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to trans-

mit, or the transmission from the dead to the living, on which such taxes are more immediately rested • • • it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties.' *Knowlton* v. *Moore*, 178 U. S. 41, 56, 57. The value of property transferred without consideration and in contemplation of death is included in the value of the gross estate of the decedent for the purposes of a death tax, because the transfer is considered to be testamentary in effect. *Milliken* v. *United States*, 283 U. S. 15, 23. *But such a transfer, not so made, embodies a transaction begun and completed wholly by and between the living, taxable as a gift* (*Bromley* v. *McCaughn*, 280 U. S. 124), *but obviously not subject to any form of death duty, since it bears no relation whatever to death.* The 'generating source' of such a gift is to be found in the facts of life and not in the circumstance of death. And the death afterward of the donor in no way changes the situation; that is to say, the death does not result in a shifting, or in the completion of a shifting, to the donee of any economic benefit of property, which is the subject of a death tax, *Chase Nat. Bank* v. *United States*, 278 U. S. 327, 338; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 346; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271; *nor does the death in such a case bring into being, or ripen for the donee or anyone else, so far as the gift is concerned, any property right or interest which can be the subject of any form of death tax.* Compare *Tyler* v. *United States*, 281 U. S. 497, 503. Complete ownership of the gift, together with all its incidents, has passed during the life of both donor and donee, and no interest of any kind remains to pass to one or cease

in the other in consequence of the death which happens afterward." (Italics supplied.)

See also *Handy* v. *Delaware Trust Co.*, 285 U. S. 352.

It was held in *Heiner* v. *Donnan* that the classification is wholly arbitrary and void as a denial of due process of law, where the effect of the classification is, by creation of a fictitious status, to label as testamentary in character transfers completed between the living which are not in fact testamentary in character. This rule is applicable to the instant case, since the type of transfer involved has been determined in *May* v. *Heiner* not to be testamentary in nature.

The Government advances the argument that since the state courts had construed state succession tax statutes to include such transfers as that here involved within the category of gifts "intended to take effect in possession or enjoyment at or after death" Congress understood this type of transfer as being a substitute for a testamentary transfer. It is submitted, however, that irrespective of what motive Congress may have had for its attempted classification of such *inter vivos* transfers, *it was nevertheless limited to the proper scope of the Federal estate tax.* This is clearly demonstrated by the decision in *May* v. *Heiner* which, on the question of construction of the term "intended to take effect in possession or enjoyment at or after death" within the scope of the Federal estate tax reached a conclusion directly opposite to that reached by the state courts construing similar language in the succession tax statutes. See *Blodgett* v. *Guaranty Trust Co.*, 114 Conn. 207.

The decision in *May* v. *Heiner*, that such a gift as that here involved is not testamentary in character, but is a

completed *inter vivos* transfer when made, and the decision in *Heiner* v. *Donnan* that such pure gifts *inter vivos* may not be brought within the operation of the Federal estate tax, absolutely precludes any argument by analogy based upon the construction placed by the state courts upon succession tax statutes.

The essential distinctions between the Federal estate tax and State succession taxes have been consistently maintained by this Court. See *Coolidge* v. *Long*, 282 U. S. 582; *Saltonstall* v. *Saltonstall*, 276 U. S. 260; *Nichols* v. *Coolidge*, 274 U. S. 531; *Knowlton* v. *Moore*, 178 U. S. 41. One of these essential distinctions between the two types of taxes is that, while on the one hand the succession tax is levied upon the receipt of possession and enjoyment of the property by the transferee upon the death of the transferor, on the other hand the Federal estate tax is levied upon the *transfer* of the estate of a decedent effected by his death. Thus, under the Federal estate tax, an irrevocable *inter vivos* transfer with remainders vested is held to be complete when made, even though the transferor reserves the income for life, the life estate being merely obliterated by his death and complete ownership having been fixed at the time of the transfer. *May* v. *Heiner*, *supra*. On the other hand, under a State succession tax statute, the transfer is not complete in the transferee if there may be any shifting of economic benefits of property to the transferee upon the transferor's death. *Saltonstall* v. *Saltonstall*, *supra*. This essential distinction between the nature of the events giving rise to the two types of taxes was well stated in *Saltonstall* v. *Saltonstall*, which case involved the Massachusetts Inheritance tax, where the Court said (276 U. S. 260, 271):

> "So long as the privilege of succession has not been fully exercised it may be reached by the tax.

See *Cahen* v. *Brewster*, 203 U. S. 543; *Orr* v. *Gilman*, 183 U. S. 278; *Chanler* v. *Kelsey*, *supra*; *Moffitt* v. *Kelly*, *supra*; *Nickel* v. *Cole*, *supra*. And in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, *which is the subject of a succession tax*, may even in the case of a vested remainder be restricted or suspended by other legal devices." (Italics supplied.)

The petitioner relies strongly upon the decision of this Court in *Guaranty Trust Co.* v. *Blodgett*, 287 U. S. 509. An analysis of this decision will demonstrate that it is in no way determinative of the issues in the instant case. In *Guaranty Trust Co.* v. *Blodgett* the Connecticut supreme court had construed a succession tax statute of that state levying an inheritance tax upon property acquired by beneficiaries by virtue of *inter vivos* transfers "intended to take effect in possession or enjoyment at the death of the grantor or donor" to include within its language an *inter vivos* transfer with the reservation of a life estate by the donor. *Blodgett* v. *Guaranty Trust Co.*, 114 Conn. 207. The State court, however, was careful to differentiate the problem there involved, *i. e.*, the construction of a succession tax statute, from the question with respect to the Federal estate tax, because of the basic difference between the two systems of taxation. The Court, after discussing the decisions in the *Reinecke* case, in *May* v. *Heiner*, and the three *per curiam* decisions of *Burnet* v. *Northern Trust Co.*, *Morsman* v. *Burnet*, and *McCormick* v. *Burnet*, determined that the rules therein enunciated with respect to the Federal estate tax were different from the rules properly applicable to an inheritance tax statute,

and were not binding upon the court in its construction of the local statute in that case. Thus the State court said (114 Conn. 207, 217):

> " . . . It is obvious from the quotation from the opinion in the *Reinecke* case which we have given above, that the decision, upon which the succeeding cases relied, was motivated by the nature of the Federal estate tax, which is upon the transfer of, rather than the succession to, property of the decedent. *Knowlton* v. *Moore,* 178 U. S. 41, 20 Sup. Ct. 747; *Y. M. C. A. of Columbus* v. *Davis* (1924) 264 U. S. 47, 44 Sup. Ct. 291; *Edwards* v. *Slocum* (1924) 264 U. S. 61, 62, 44 Sup. Ct. 293. 'The tax is on the act of the testator not on the receipt of property by the legatees.' *Ithaca Trust Co.* v. *United States* (1929) 279 U. S. 151, 155, 49 Sup. Ct. 291; *Corbin* v. *Townshend,* 92 Conn. 501, 505, 103 Atl. 607; *Gleason & Otis, Inheritance Taxation* (4th Ed.) p. 2, *et seq.* On the other hand, with a few exceptions, the State inheritance tax statutes levy a duty or excise upon the beneficiary for the privilege or right of succession to property. *Silberman* v. *Blodgett,* 105 Conn. 192, 205, 134 Atl. 778; *Gleason & Otis, Inheritance Taxation* (4th Ed.) p. 4. The Connecticut tax is of this nature. *Blodgett* v. *New Britain Trust Co.,* 108 Conn. 715, 720, 145 Atl. 56; *Bankers Trust Co.* v. *Blodgett,* 96 Conn. 361, 365, 114 Atl. 104. The Federal cases above mentioned which are relied upon in support of the claim that the transfers here in question are not taxable, since they 'deal with the construction of Federal statutes imposing estate taxes . . . are distinguishable because of the terms of those statutes, if not on other grounds.' *Worcester County National Bank* v. *Commissioner of Corporations and Taxation* (Mass., 1931),

175 N. E. 726, 729. We have been able to discover no relevant subsequent case which has given these decisions an effect adverse to the taxability of such gifts under State succession tax statutes. * * * Therefore, we feel that we are not constrained to place a similar construction upon our own statute and are still at liberty to adhere to the views as to its meaning and scope which usually have been held as to State statutes of similar nature and terms and which we indicated in *Blodgett* v. *Union & New Haven Trust Co., supra;* these lead to the conclusion that the property which was the subject of transfer was within the meaning of the statute, and taxable accordingly."

This Court in reviewing the decision of the State court, said (287 U. S. 509, 513):

"Since the court below construed the act of 1923, * * * as embracing the event sought to be taxed, and since in that view the question of contract impairment does not arise, we are bound by the decision of that court as though the meaning as fixed by the court had been expressed in the statute itself in specific words."

Thus, it was merely held in *Guaranty Trust Co.* v. *Blodgett,* that *so far as the Connecticut succession tax was concerned,* the Supreme Court was bound by the construction placed upon the statute by the highest court of that state, and, in line with the *dictum* in *Coolidge* v. *Long,* 282 U. S. 582, 596, that "undoubtedly the State has power to lay such an excise upon property so passing after the taking effect of the taxing Act," that such construction did not offend the Fourteenth Amendment.

2. The Classification is not an Exercise of the Taxing Power within the Constitutional Limitations Determined by this Court.

The test whether, in any specific instance, the classification by Congress of an *inter vivos* transfer with transfers normally subject to the Federal estate tax amounts to a denial of due process of law, is (1) whether such classification is unnecessary or inappropriate to the proposed end,—the end being the prevention of evasion of tax, (2) whether the classification is unreasonably harsh or oppressive when viewed in the light of the expected benefit, and (3) whether the classification arbitrarily ignores recognized rights to enjoy or convey individual property. The rule was thus stated in *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, 90:

> "Congress may adopt a measure reasonably calculated to prevent avoidance of a tax. The test of validity in respect of due process of law is whether the means adopted are appropriate to the end. A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property without due process. ***But if the means are unnecessary or inappropriate to the proposed end, are unreasonably harsh or oppressive, when viewed in the light of the expected benefit, or arbitrarily ignore recognized rights to enjoy or to convey individual property, the guarantee of due process is infringed.***
>
> "Illustrations are not lacking of cases falling on either side of the line." (Italics supplied.)

It is the contention of respondent under these principles that, since the transfer here involved has been determined by this Court to be a pure gift *inter vivos*, not testamentary in character, such a transfer completed between the living and which bears no relation to death may not constitutionally be classified with transfers at death and transfers testamentary in character for the purpose of subjecting it to the Federal estate tax, for the reason that such classification is not within the limitations upon the constitutional exercise of the taxing power defined in *Helvering* v. *City Bank Farmers Trust Co., supra.*

(a) *The Classification is not Necessary to Prevent Evasion of Tax.*

That the classification attempted by the 1931 amendment is an arbitrary and unreasonable exercise of the taxing power is further demonstrated by the fact that irrevocable *inter vivos* transfers with reservation of a life estate to the transferor are transfers which may properly be reached by a gift tax. *Bromley* v. *McCaughn*, 280 U. S. 124. Therefore, Congress, in attempting to bring such transfers within the scope of the Federal estate tax by classifying them with transfers at death and *inter vivos* transfers testamentary in character, adopted unnecessary means to the proposed end—the end being prevention of evasion of tax.

A constitutional exercise of the taxing power by Congress, by means of classification, whereby one status not normally within the scope of the tax is deemed the equivalent of another status falling normally within the scope of the taxing power, *is conditioned upon the exercise of the taxing power being one reasonably requisite to prevent evasion of tax. Helvering* v. *City Bank Farmers Trust Co., supra.* That condition is not here present, where Con-

gress might properly have levied a gift tax upon the transfer.

That Congress has mistaken the means of achieving the proposed end does not argue for the support of the tax, if the guarantee of due process is infringed.

The gift tax law enacted by the Revenue Act of 1932 was intended to, and does, apply to just such transfers as that in the instant case. The purpose of the gift tax is to reach those types of *inter vivos* transfers which may not properly be subjected to a tax upon transfers that take effect at death. See *Burnet* v. *Guggenheim*, 288 U. S. 280, 286.

Since evasion of tax here cannot mean evasion of a particular type of tax within the field of "privilege" taxes,—*i. e.*, it does not mean "evasion of Federal estate tax",—if Congress may, by a reasonable exercise of its taxing power, reach the specific transfer, as by imposition of a tax on gifts *inter vivos*, there is no evasion. Therefore the means adopted,—the classification of such a transfer as one testamentary in character in order to force it within the scope of the tax on transfers taking effect at death,—is not justifiable as a measure reasonably requisite to prevent evasion.

(b) *The classification is unreasonably harsh and oppressive when viewed in the light of the expected benefit.*

The effect of the tax upon an irrevocable *inter vivos* transfer with remainders vested at the time of the transfer, as in this case, is clearly to include in the decedent's gross estate for the purpose of measuring the death tax, property which was absolutely and irrevocably vested in persons other than decedent during her lifetime—property which was at the time of the transfer properly the subject

of a gift tax, but the transfer of which bore no relation whatever to death.

Before the death of the life tenant the value of the remainderman's interest in the property under such an *inter vivos* transfer as in the instant case is computed to be the total value of the property less the value of the life estate determined according to the mortality tables. This is present property value and not a future expectancy.

As pointed out in *Heiner* v. *Donnan*, 285 U. S. 312, 330, "the event upon which the tax is made to depend is not the transfer of the gift, but the transfer of the estate of the decedent. The tax falls upon the estate, and not upon the gift, and is computed not upon the value of the gift, but, by progressively graduated percentages, upon the value of the entire estate." The effect of the operation of the statute in such a case by inclusion of the value of the gift in the gross estate of the decedent is to tax to decedent's estate that value represented by the sole ownership of the remaindermen. This is to measure the tax on A's property by imputing to it in part the value of the property of B, a result condemned in *Heiner* v. *Donnan*, and in *Hoeper* v. *Tax Commission*, 284 U. S. 206, as in violation of the Fifth Amendment. Such a tax is particularly oppressive and amounts to confiscation of property of the estate where there has been an increase in the value of the vested remainders during the decedent's lifetime subsequent to the time of the irrevocable *inter vivos* transfer.

In *Heiner* v. *Donnan*, the Court said (285 U. S. 312, 327):

> ". . . the tax, in part, is laid in respect of property shown not to have been transferred in contemplation of death and the complete title to which had passed to the donee during the lifetime of the donor;

and secondly, *the tax is not laid upon the transfer of the gift or in respect of its value. It is laid upon the transfer, and calculated upon the value, of the estate of the decedent, such value being enhanced by the fictitious inclusion of the gift,* and the estate made liable for a tax computed upon that value. *Moreover, under the statute the value of the gift when made is to be ignored, and its value arbitrarily fixed as of the date of the donor's death.* The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description. *Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B,* a result which both the *Schlesinger* and *Hoeper* cases condemn as arbitrary and a denial of due process of law. Such an exaction is not taxation but spoliation." (Italics supplied).

In *Hoeper* v. *Tax Commission, supra,* where a Wisconsin statute providing for the computation of the income tax of a husband and wife on the basis of the combined total of their incomes as shown by separate returns, treating the aggregate as the income of the husband, was held to be a denial of due process of law under the Fourteenth Amendment, the Court said (284 U. S. 206, 215):

"We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such

by calling it income. Compare *Nichols* v. *Coolidge*, 274 U. S. 531, 540."

(c) *The classification arbitrarily ignores recognized rights to enjoy and convey individual property.*

With respect to the Federal estate tax it was said in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 347:

> "One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax. * * *"

The effect of the classification here involved is to bring within the scope of the death tax transfers between the living which bear no relation to death, and which, as shown hereinabove, are pure gifts *inter vivos*. The effect of this classification is to ignore individual rights to convey property between the living, and is to impose a death tax upon conveyances completed long before death and without relation thereto.

C. The Tax upon the Value of the Vested Remainders is in Effect a Direct Tax.

The effect of the classification of transfers such as that in the instant case with transfers at death and transfers testamentary in character is, so far as the vested interest of the remaindermen is concerned, to subject it to a direct tax, which is in violation of Article I, Section 9, subdivision 4 of the Constitution, because not apportioned as therein provided. When the tax levied upon the gross estate of the decedent is laid upon the value of the property of the remaindermen, irrevocably vested in them prior to the death of the transferor, the tax ceases to be an excise tax upon the privilege of transferring property, and becomes a direct tax upon the property itself.

D. If Unconstitutional as a Denial of Due Process of Law for any Reason Whatsoever, the Tax Cannot be Upheld, even though it should be a Measure Reasonably Requisite to Prevent Evasion.

It has been shown hereinabove (see *supra* pp. 35, 36) that the statute as amended is not a measure reasonably requisite to prevent evasion of tax. However, even if it were held to be a reasonable tax evasion measure, the statute, if unconstitutional on other grounds as a denial of due process of law, as hereinabove set forth, nevertheless is void. An otherwise unconstitutional tax may not be justified as a measure necessary to prevent tax evasion. *Heiner* v. *Donnan*, 285 U. S. 312; *Hoeper* v. *Tax Commission*, 284 U. S. 206; *Schlesinger* v. *Wisconsin*, 270 U. S. 230. This limitation upon the exercise of the taxing power by means of classification was stated in *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, 92, as follows:

> "There are, * * * limits to the power of Congress to create a fictitious status under the guise of supposed necessity. Thus it has been held that an act creating a conclusive presumption that a gift made within two years prior to death was made by the donor in contemplation of death, and requiring the value of the gift to be included in computing the estate of the decedent subject to transfer tax, is so grossly unreasonable as to violate the due process clause of the Fifth Amendment. In the same category falls a statute seeking to tax the separate income of a wife as income of her husband."

In *Hoeper* v. *Tax Commission, supra*, the argument that the tax was a necessary classification in order to prevent tax evasion was rejected, the Court quoting from its opinion in *Schlesinger* v. *Wisconsin, supra*, in answer to the

argument that the claimed necessity justified the otherwise unconstitutional exaction. In the latter case the Court, in holding unconstitutional the conclusive presumption provision of a Wisconsin statute that all transfers made within six years before death were made in contemplation of death, after stating that the property transferred *inter vivos* was "subjected to graduated taxes which could not properly be laid on all gifts or, indeed, upon any gift without testamentary character," said (270 U. S. 230, 240):

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B'. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

Therefore, if the taxing statute, Section 302(c), Revenue Act of 1926, as amended either by the Joint Resolution of March 3, 1931, or by Section 803(a), Revenue Act of 1932, shall be held to have any application to the transfer here involved, said statute as amended should be held to be in violation of the Fifth Amendment.

III.

The 1931 and 1932 amendments to Section 302(c), Revenue Act of 1926, may not be Construed to Apply to a Transfer before March 3, 1931, or if they may be so Construed, They are Unconstitutional.

It is contended by the Government that if respondent shall prevail in his contention that the question of liability for the tax must be determined with respect to the 1927 trust, and not with respect to the 1932 trust, then either the 1931 or 1932 amendments to Section 302(c) may be applied retroactively to tax that portion of the 1927 trust from which decedent continued to receive the income until her death by virtue of the 1932 trust.

It is the contention of respondent that neither the 1931 amendment nor the 1932 amendment may be construed to apply to such a transfer completed before March 3, 1931. However, if it should be held that either of said amendments may be construed to have such retrospective application, then said enactments so applied are in violation of the due process clause of the Fifth Amendment. The argument with respect to these questions is fully developed in the respondent's brief in *Helvering* v. *Marshall,* No. 484, present Term. To avoid duplication of argument here, reference is made to the argument in that brief as determinative of the questions here involved on this point.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

SAMUEL S. HOLMES,
WILLIAM D. MITCHELL,
LORENTZ B. KNOUFF,
Counsel for Respondent.

January, 1938.

APPENDIX

As originally enacted, Section 302(c) of the Revenue Act of 1926, c. 27, 44 Stat. 9, provided:

> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * * (U. S. C., Title 26, Sec. 411.)

The 1931 amendment of Section 302(c), Joint Resolution (Pub. 131), approved March 3, 1931, c. 454, 46 Stat. 1516, amended subsection (c) to read as follows:

> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a

bona fide sale for an adequate and full consideration in money or money's worth" * * * (U. S. C., Title 26, Section 411(c)). (Italics represent matter added by 1931 amendment).

The 1932 amendment of Section 302(c), Section 803(a), Revenue Act of 1932, c. 209, 47 Stat. 169, amended said subsection (c) to read as follows:

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life* or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the *right to the income from, the property,* or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *" (U. S. C., Title 26, Section 411). (Italics represent matter changed by 1932 amendment, so far as material to this case.)

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Supreme Court of the United States

OCTOBER TERM—1937.

No. 349

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

against

SELLAR BULLARD, as Executor under the Last Will and Testament of CLARA R. SMITH, Deceased,
Respondent.

BRIEF OF *AMICUS CURIAE*

On question of Construction.

HERMAN AARON,
Amicus Curiae,
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INDEX.

	PAGE
QUESTION PRESENTED	1
FACTS	2
ARGUMENT	3
POINT I. Subdivision (c), Section 302, does not apply to transfers under which the transferor has retained the income from the property for life or other period, unless it was made "in contemplation of or intended to take effect in possession or enjoyment at or after death". As the transfer in question was not made in such contemplation or to so take effect, the subdivision does not apply to the case at bar	3
POINT II. Bearing in mind that the established rule in the interpretation of statutes levying taxes is not to extend their provisions by implication beyond the clear import of the language used, and to resolve any reasonable doubt in favor of the taxpayer, it follows that the contention in Point I, supra, should be upheld	7
CONCLUSION	9

TABLE OF CASES.

	PAGE
American Net & Twine Co. v. *Worthington*, 141 U. S. 468	8
Barnard v. *Darling*, 113 Mass. 218	4
Bashaw, United States v., 50 Fed. Rep. 749	6
Benziger v. *United States*, 192 U. S. 38	8
Burnet v. *Northern Trust Co.*, 283 U. S. 782	3
Darling, Barnard v., 113 Mass. 218	4
Field, United States v., 255 U. S. 257	5, 6
First Trust & Savings Bank, Smietanka v., 257 U. S. 602	5
Girr v. *Scudds*, 11 Exchequer 191	8
Gould v. *Gould*, 245 U. S. 151	5, 8
Harbeck, Matter of, 161 N. Y. 211	6
Heiner, May v., 281 U. S. 238	3, 8
Henry's Executor v. *Henry's Executor*, 81 Kentucky 342	4
Isham, United States v., 17 Wall 496	8
Matter of Harbeck, 161 N. Y. 211	6
Matter of Miller, 110 N. Y. 216	6
May v. *Heiner*, 281 U. S. 238	3, 8
McCook County, Neher v., 11 S. Dak. 422	4
Miller, Matter of, 110 N. Y. 216	6
Montella Salt Co. v. *Utah*, 221 U. S. 452	4
Neher v. *McCook County*, 11 S. Dak. 422	4
Northern Trust Co., Burnet v., 283 U. S. 782	3
Northern Trust Co., Reinecke v., 278 U. S. 339	7

PAGE

Reinecke v. *Northern Trust Co.*, 278 U. S. 339 7

Scudds, Girr v., 11 Exchequer 191 8
Smietanka v. *First Trust & Savings Bank*, 257 U. S. 602 5

Treat v. *White*, 181 U. S. 264 ..... 5, 8

United States v. *Bashaw*, 50 Fed. Rep. 749 6
United States, Benziger v., 192 U. S. 38 8
United States v. *Field*, 255 U. S. 257 ..... 5, 6
United States v. *Isham*, 17 Wall 496 8
United States v. *Wigglesworth*, 2 Story 369 8
Utah, Montella Salt Co. v., 221 U. S. 452 4

White, Treat v., 181 U. S. 264 ..... 5, 8
Wigglesworth, United States v., 2 Story 369 8
Worthington, American Net & Twine Co. v., 141 U. S. 468 8

REVENUE ACT OF 1926.

Section 302, Subdivision (c), as amended by Joint Resolution of March 3, 1931 ..... 1, 2, 3
Same Section, as amended June 6, 1932 ..... 5, 6

Supreme Court of the United States,

OCTOBER TERM 1937

No. 349.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
vs.
SELLAR BULLARD, as Executor under the Last Will and Testament of CLARA R. SMITH, Deceased,
Respondent.

BRIEF OF *AMICUS CURIAE*

On question of Construction.

The undersigned, being counsel for executors of a settlor of a trust which, as does this cause, involves the question herein presented, does, with the consent of counsel for the respective parties, file this brief as *amicus curiae* on behalf of such executors.

Question Presented.

The question presented is the CONSTRUCTION of Section 302, subdivision (c) of the Revenue Act of 1926 as amended by the Joint Resolution of March 3rd, 1931. Specifically, the question is whether there is to be included in the gross estate of a decedent the value of property transferred by a decedent during her lifetime *which was not made*

in contemplation of or intended to take effect in possession or enjoyment at or after her death, but in which the decedent had reserved a life interest.

Facts.

This record presents the question of the taxability under the Estate Tax Law of a trust transfer made *after March 3rd, 1931* and *before June 6th, 1932*. By the Joint Resolution of March 3rd, 1931, Section 302, subdivision (c) of the Revenue Act of 1926 was amended so as to require the value of the gross estate of a decedent to be determined by including the value at the time of his death of all property wherever situated *"To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth"*. The matter between the asterisks (* . . . *) was added by that Joint Resolution to the then existing law. From the time of said amendment of March 3rd, 1931, until June 6th, 1932, the law as so amended continued without change.

In February, 1932, according to the Court's finding, the decedent Clara R. Smith made a transfer in trust under which she was to receive the income during her lifetime. There is no proof or claim that the transfer was made in contemplation of death. Furthermore, the decisions of this Court definitely establish the proposition that the transfer so made was not intended to take effect in possession or enjoyment at or after the donor's death, since the interests of the beneficiaries under the transfer were acquired by

them and became effective by and at the time of the execution of the instrument (*May* v. *Heiner*, 281 U. S. 238; *Burnet* v. *Northern Trust Co.*, 283 U. S. 782).

The record thus presents the bald question whether the trust property so transferred is to be deemed a part of the decedent's gross estate solely by reason of the fact that the decedent as donor, when she made the transfer, reserved unto herself a life interest in the income. That raises a question of the *construction* of subdivision (c) of Section 302, *supra*, which is the only question that we shall discuss.

It will be noted that we are not dealing with the question of *constitutionality* which we are informed will be discussed by others.

POINT I.

Subdivision (c), Section 302, does not apply to transfers under which the transferor has retained the income from the property for life or other period, unless it was made "in contemplation of or intended to take effect in possession or enjoyment at or after death". As the transfer in question was not made in such contemplation or to so take effect, the subdivision does not apply to the case at bar.

A. The real question involved is whether the clause following the word "including" is qualified by the preceding language of subdivision (c) or whether it provides for an entirely independent class of transfers. If it were to be read as creating an absolute independent taxable class, why use the word "*including*" immediately after the preceding class provision? Why not use the word "*or*" which would be obviously suggested? That would have been the natural and apt word to use in providing for an additional independent class.

The Court will note by reading the subdivision that the word "*or*" was repeatedly and accurately used. If provi-

sion was to be made for an independently additional class for taxation, the word *"or"* would have done so. It would have been unambiguous, natural and apt. Instead, however, of using the word *"or"*, Congress took the pains to use the word "including", which obviously indicates that instead of being independent of the foregoing provision, the amplifying language was to be qualified thereby.

We are asked to believe that to express an absolute additional taxable class which could be simply done by the use of the word "or", which had been used ten times within the spacing of a few lines, Congress broke away from the use of that simple and expressive word, and instead used the expression "including", which has quite a contrary meaning. Its meaning is anything but that of betokening an absolute independent alternative. On the contrary, it has a dependent meaning. It presents something which is a part of something else—which is included in the foregoing class.

In *Montella Salt Co.* v. *Utah,* 221 U. S. 452, the Court cited the following three cases bearing upon this point with approval, namely (page 464):

> "In the case of *Barnard* v. *Darling,* 113 Massachusetts, 218, it was held that a legacy of $100 'including money trusteed at a certain bank,' could not be construed as meaning that the sum of $100 was in addition to the sum in bank.
>
> "In *Henry's Executor* v. *Henry's Executor,* 81 Kentucky, 342, a bequest of $14,000 'including certain notes,' was held to mean that the notes formed a part of the $14,000 and were not in addition thereto.
>
> "In *Neher* v. *McCook County,* 11 S. Dak. 422, it was held that a certain section of the laws of the State which provided that the sheriff's fees should be $16 for summoning a jury 'including mileage,' did not entitle him to mileage in addition to the $16."

We respectfully submit that there does not arise in this case the necessity of resorting to construction in search of

an intent since the words themselves are clear. A statute after all must be judged by its language, whatever intent Congress may have had. The only way of translating such intent into effective legislation is to pass a statute in words. If the words are unambiguous and clear, their meaning supplies the meaning of the law.

In *Smietanka* v. *First Trust and Savings Bank*, 257 U. S. 602, the Court says, page 605:

> "• • • It may be that Congress had a general intention to tax all incomes whether for the benefit of persons living or unborn, but a general intention of this kind must be carried into language which can be reasonably construed to effect it. Otherwise, the intention can not be enforced by the courts. The provisions of such acts are not to be extended by implication. *Treat* v. *White*, 181 U. S. 264, 267; *United States* v. *Field*, 255 U. S. 257; *Gould* v. *Gould*, 245 U. S. 151, 153."

B. On June 6th, 1932, Congress amended the subdivision in question so as to make it read as follows:

> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end* before his death (1) the possession or enjoyment of, or *the right to* the income from, the *property, or* (2) the *right, either alone* or *in conjunction with any person, to* designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death with-

out such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

(New matter in italics) This amendment adds to the subdivision for taxation a separate class, independent of the foregoing class, instead of one which is limited by the preceding class.

The passage of the 1932 amendment was a recognition by Congress that the previous Act did not apply to cases of transfers with a reservation of life income, unless they were included within the first clause of subdivision (c) or at least that it was doubtful whether or not the previous Act did so apply. Unless that were so, then with respect to cases like the one under review, what would have been the need of passing the 1932 amendment?

The decision in *United States* v. *Field*, 255 U. S. 257, is apt. The Court says, page 264:

> "It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by a decedent had such a purpose existed; and none was expressed in the act under consideration. In that of February 24, 1919, which took its place, the section providing how the value of the gross estate of the decedent shall be determined contains a clause precisely to the point (§402(e), 40 Stat. 1097): 'To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except,' etc. Its insertion indicates that Congress at least was doubtful whether the previous act included property passing by appointment. See *Matter of Miller*, 110 N. Y. 216, 222; *Matter of Harbeck*, 161 N. Y. 211, 217-218; *United States v. Bashaw*, 50 Fed. Rep. 749, 754. The Government contends that the amendment was made for the purpose of clarifying rather than extending the law as it stood, and cites a statement to that effect

in the Report of the House Committee on Ways and Means (House Doc. No. 1267, p. 101, 65th Cong., 2d sess.). It is evident, however, that this statement was based upon the interpretation of the Act of 1916 adopted by the Treasury Department; the same report proceeded to declare (p. 102) that 'The absence of a provision including property transferred by power of appointment makes it possible, by resorting to the creation of such a power, to effect two transfers of an estate with the payment of only one tax;' and this, together with the fact that the committee proposed that the law be amended, shows that the Treasury construction was not treated as a safe reliance."

Using the language of the Court just cited, we may say that it would have been easy for Congress in the Joint Resolution of 1931, to express a purpose to tax property unequivocally and absolutely in which there was a reservation of a life estate. It might very easily have done what it did in 1932, but it did not do so.

POINT II.

Bearing in mind that the established rule in the interpretation of statutes levying taxes is not to extend their provisions by implication beyond the clear import of the language used, and to resolve any reasonable doubt in favor of the taxpayer, it follows that the contention in Point I, supra, should be upheld.

In *Reinecke* vs. *Northern Trust Co.*, 278 U. S. 339, the Court says, page 348 (Italics ours):

"In the light of the general purpose of the statute and the language of §401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in §402 (c)

'to take effect in possession or enjoyment at or after his death,' include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under §401. *That doubt must be resolved in favor of the taxpayer . . . .*"

Quoted with approval—*May* v. *Heiner*, 281 U. S. 244.

In *Gould* v. *Gould*, 245 U. S. 151, the question involved was whether under the Federal income tax law taxing, among other things, gains or profits and income derived from any source whatever, included alimony. The Court held it did not, and said, page 153:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government and in favor of the citizen. *United States* v. *Wigglesworth*, 2 Story, 369; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468, 474; *Benziger* v. *United States*, 192 U. S. 38, 55.

"As appears from the above quotations, the net income upon which subdivision 1 directs that an annual tax shall be assessed, levied, collected and paid is defined in division B. The use of the word itself in the definition of 'income' causes some obscurity, but we are unable to assert that alimony paid to a divorced wife under a decree of court falls fairly within any of the terms employed."

In *Treat* v. *White*, 181 U. S. 265, the Court says, page 287:

". . . It is also true, as said by this court in *United States* v. *Isham*, 17 Wall 496, 504, 'if there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because in the language of Pollack, C. B., in *Girr* v. *Scudds*, 11 Exchequer, 191, "a tax cannot be imposed without

clear and express words for that purpose.'' ' With that proposition we fully agree. There must be certainty as to the meaning and scope of language imposing any tax, and doubt in respect to its meaning is to be resolved in favor of the taxpayer. . . . ''

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

HERMAN AARON,
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 349.—October Term, 1937.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Sellar Bullard, as Executor under the last will and testament of Clara R. Smith, deceased.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 28, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner challenges a decision holding unconstitutional the provision of Section 302 (c) of the Revenue Act of 1926,[1] as amended by Joint Resolution of Congress of March 3, 1931,[2] which requires the inclusion in a decedent's gross taxable estate of property transferred by irrevocable deed with reservation of a life estate. On account of alleged conflict with our decisions and of the important constitutional question presented we granted the writ of certiorari.

Clara R. Smith, a resident of Illinois, died in 1933. In 1927 she transferred securities, by irrevocable deed, to her son Edward, in trust to pay the income to her for life and, upon her death, to divide the corpus into three equal parts, the income from a part to be paid to each of her three children, Lora, Bessie, and Edward, during their lives, with remainders of the daughters' shares to their respective children; upon Edward's death leaving no issue the income from his share to be paid to his widow for life and, upon her death, the remainder to be added, in equal shares, to the daughters' trust funds. Edward died in 1928 leaving a widow but no issue.

In 1931 dissatisfaction with the administration of the trust impelled the decedent to seek its abrogation. Examination of the instrument disclosed violation of the rule against perpetuities. A bill was accordingly filed in an Illinois state court to have the trust declared void. The son's widow answered denying invalidity.

[1] c. 27, 44 Stat. 9, 70; U. S. C. Tit. 26, § 411(c).
[2] c. 454, 46 Stat. 1516; U. S. C. Tit. 26, § 411 (c).

A guardian *ad litem* representing the interests of infant beneficiaries in remainder also opposed the prayer of the bill. Subsequently, to avoid family discord and amicably to settle the pending litigation, a compromise agreement was made by the decedent and all the adult beneficiaries consenting to the entry of a decree on condition that the decedent would declare a new trust of approximately one-third of the securities in the existing trust whereby Edward's widow should enjoy a life interest identical to that given her by the 1927 trust and, upon her death, the remainder should be equally divided between the decedent's daughters. The agreement further required the making of testamentary provision for the decedent's daughters and grandchildren, and certain outright gifts to the latter. In pursuance of the agreement, the decedent, on February 17, 1932, executed a new irrevocable deed of trust conveying approximately one-third of the corpus of the former trust and reserving to herself a life interest in the income, and executed a new will. A consent decree was then entered in the equity suit, the guardian *ad litem* representing to the court that the settlement would be advantageous to the minor beneficiaries.

The Commissioner's inclusion of the corpus of the trust of February 17, 1932, in the gross estate was sustained by the Board of Tax Appeals.[3] The Circuit Court of Appeals reversed the Board's decision.[4] We are of opinion that the action of the Commissioner and the Board should have been affirmed.

First. Both the Board and the Court held that the decree of the state court, notwithstanding its entry pursuant to stipulation, adjudicated the rights of the parties, abrogated the trust of 1927, and established the decedent's absolute ownership of the assets. This conclusion is fully supported by decisions of the Supreme Court of Illinois and we accept it. It follows that the respondent's contention that the transfer of 1932 has no independent existence and that, in legal effect, the trust for the son's widow stems from the deed of 1927, must be overruled.

Second. The trust of 1932 was created after the adoption of the Joint Resolution of March 3, 1931, which required inclusion in the gross estate of the value at the date of death of all property to the extent of any interest therein of which a decedent has at any time made a transfer by trust or otherwise under which the transferor

[3] 34 B. T. A. 243.
[4] 90 F. (2d) 144.

etained for life the possession or enjoyment of the income from the roperty, except in case of a bona fide sale for an adequate and ull consideration in money or money's worth. It is urged that the ettlement of the dispute as to the invalidity of the trust deed of 927, conditioned, as it was, upon the making of the new trust, onstitutes such a bona fide sale, for adequate consideration, as to ring the trust of 1932 within the exception. The argument is hat the decree setting aside the 1927 trust merely gave judicial anction to the compromise agreement and that the contract was or an adequate and valuable consideration and would, therefore, ave been enforced by a court of equity at the instance of any of he parties to it.

While recognizing that a decree thus begotten has the same force nd effect as a decree *in invitum*, the respondent seeks to go behind he decree and spell out a sale by Edward's widow of her interest nder the 1927 trust for the interest conferred upon her by the 932 trust. The court below has held the position untenable and e agree. The decree declared the 1927 trust void and revested he trust assets in the decedent. If that trust was, as the Illinois ourt decreed, void and ineffective because it violated the rule gainst perpetuities the son's widow took no interest under it and ave nothing to procure the 1932 transfer.

Third. The Commissioner relies not only upon the Joint Reso- ution of March 3, 1931, but upon Section 803 (a) of the Revenue ct of 1932.[5] We need not consider the latter since the Joint Reso- ution, if legally enforcible, in express terms authorized his inclu- ion of the trust fund in the decedent's gross estate. As the Reso- ution was adopted nearly a year prior to the creation of the 1932 rust no claim is or can be made that, as to that transaction, it is etroactive. The contention is that the transfer was *inter vivos*, as presently effective, was irrevocable, was not made in contem- lation of, or effective at, death, and that Congress was, therefore, ithout power to make it the subject of an estate or inheritance ax; that, while the transfer might, by appropriate legislation, have een taxed as a gift, to tax it as in the nature of a testamentary lisposition is a denial of due process. The contention is unsound or several reasons. Since Congress may lay an excise upon gifts t is of no significance that the exaction is denominated an estate ax or is found in a statute purporting to levy an estate tax. More-

[5] c. 209, 47 Stat. 169, 279; U. S. C. Tit. 26, § 411 (c).

over, Congress having the right to classify gifts of different sorts might impose an excise at one rate upon a gift without reservation of a life estate and at another rate upon a gift with such reservation. Such a classification would not be arbitrary or unreasonable. A further vindication of the exaction is the authority of Congress to treat as testamentary transfers with reservation of a power or an interest in the donor. The legislative history of the Joint Resolution, to which reference is made in Nos. 375 and 484, decided this day, demonstrates that the purpose of the legislation was to prevent avoidance of estate taxes. As has been said by the Court of Appeals of New York:[6] "It is true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is a transfer with reservation of a life estate."

We have recently sustained the prospective operation of a provision including in the gross estate property which a decedent has transferred retaining power alone, or in conjunction with any other person, to alter, amend, or revoke.[7] We held the purpose of the clause was to prevent avoidance of tax and the measure was reasonably calculated to that end. As applied to a trust created after its enactment the Joint Resolution does not violate the Fifth Amendment.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

So ordered.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[6] In the Matter of Keeney, 194 N. Y. 281, 287; affirmed 222 U. S. 525.

[7] Helvering v. City Bank, 296 U. S. 85, 90. Compare Milliken v. United States, 283 U. S. 15; Tyler v. United States, 281 U. S. 497.